FOR ARGUMENT

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OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, AND JAMES T. MCINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, *Petitioners,*

v.

SIERRA CLUB, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 581 F.2d 895. The opinion of the district court (Pet. App. 49a-58a) is reported at 395 F.Supp. 1187.

JURISDICTION

The judgment of the court of appeals (Pet. App. 59a-60a) was entered on May 15, 1978. On August 7, 1978, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including October 12, 1978, and the petition was filed on

that date. The petition was granted on January 8, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether budget requests by federal agencies which usher in considered programmatic courses following programmatic reviews of ongoing programs, and which would significantly affect the quality of the human environment if adopted, constitute "proposals for legislation" or "proposals for major Federal action" requiring the preparation of environmental impact statements under Section 102(2)(C) of the National Environmental Policy Act of 1969.

2. Whether Section 102(2)(B) of the National Environmental Policy Act of 1969, which applies to all federal agencies, requires the Office of Management and Budget to develop methods and procedures which will guide agencies in determining which budget requests must be accompanied by environmental impact statements.

STATUTES AND REGULATIONS INVOLVED

Respondents adopt by reference all of the Statutes and Regulations quoted at pages 2-5 of petitioners' brief, in accordance with Supreme Court Rules 40(3). Respondents call to the attention of the Court the following additional regulations and guidelines of the Council on Environmental Quality:

Sections 1506.8(a) and 1508.18 of Title 40, Code of Federal Regulations, as adopted by the Council on

Environmental Quality on November 29, 1978, state in part (43 Fed. Reg. 55,990, 56,001-02, 56,004-05):

> *§ 1506.8 Proposals for legislation.*
>
> (a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. . . . A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. . . .
>
> *§ 1508.18 Major Federal action.*
>
> "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. . . .
>
> (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; . . .
>
> (b) Federal actions tend to fall within one of the following categories: . . .
>
> (2) Adoption of formal plans such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.
>
> (3) . . . systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

Sections 1500.3(b), 1500(a)(1), and 1500.12 of Title 40, Code of Federal Regulations (1978) (in force until July 30, 1979) state in part:

> *§ 1500.3 Agency and OMB procedures.*
>
> (b) Each Federal agency should consult, with the assistance of the Council [on Environmental Quality] and the Office of Management and Budget, if desired, with other appropriate Federal agencies in the development and revision of the above procedures so as to achieve consistency in dealing with similar activities and to assure effective coordination among agencies in their review of proposed activities. . . .
>
> *§ 1500.5 Types of actions covered by the Act.*
>
> (a) "Actions" include but are not limited to:
>
> (1) Recommendations or favorable reports relating to legislation including requests for appropriations. . . .
>
> *§ 1500.12 Legislative actions.*
>
> (a) The Council [on Environmental Quality] and the Office of Management and Budget will cooperate in giving guidance as needed to assist agencies in identifying legislative items believed to have environmental significance. Agencies should prepare impact statements prior to submission of their legislative proposals to the Office of Management and Budget. . . .
>
> (b) . . . In cases where the scheduling of congressional hearings on recommendations or reports on proposals for legislation which the Federal agency has forwarded to the Congress does not allow adequate time for the completion of a final text of an environmental statement (together with comments), a draft environmental statement may be furnished to the Congress and made available to the public pending transmittal of the comments as received and the final text.

STATEMENT OF THE CASE

The National Wildlife Refuge System (NWRS), administered by the Fish and Wildlife Service of the Department of the Interior, is devoted to the preservation of vital habitats for the nation's wildlife. Over the 76 years of its existence, the System has grown to encompass 390 individual refuges covering 53,000 square miles. Since its inception, the System has been assigned more and more responsibilities. Thus, its scope has expanded from its original emphasis on the protection of migratory waterfowl to include the protection of all endangered wildlife from the depredations of uncontrolled development.

Unfortunately, the Refuge System has suffered from insufficient funds[1] and from confusion concerning its purposes—such as the need to protect wildlife and the desire to accommodate public use and recreation—at the very time its responsibilities have been growing. A primary cause of these problems has been the failure of the Department of the Interior and its Fish and Wildlife Service to give systematic consideration to the environmental impact of proposed levels of funding and proposed areas of emphasis within the System.

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[1] "While it was acquiring more responsibility, the [National Wildlife Refuge System] was suffering from insufficient funds and from the confusion caused by the need to serve several different purposes, such as protection of the wildlife and accommodation for public use, including recreation." Doyle, *Our National Wildlife Refuges: A Chance to Grow*, 155 Nat'l Geographic 342, 348 (1979).

Acting to remedy this situation, the Sierra Club, the National Parks and Conservation Association (NPCA) and the Natural Resources Defense Council, Inc. (NRDC) filed suit in district court for a declaratory judgment that the Department of the Interior (DOI) and the Office of Management and Budget (OMB) had violated The National Environmental Policy Act (NEPA), the Guidelines of the Council of Environmental Quality (CEQ), and other pertinent regulations and orders "by failing to prepare and consider environmental impact statements with respect to major policy decisions and actions relating to the operation of the National Wildlife Refuge System . . ." and "by failing to prepare and consider environmental impact statements with respect to proposed budgets for the operation of the National Wildlife Refuge System" (A. 19-20).[2] Sierra Club, NPCA and NRDC also requested a declaratory judgment that OMB had violated NEPA, the CEQ Guidelines, and Executive Order 11514 by failing to develop and promulgate methods and procedures to comply with NEPA (A. 20). The Complaint also requested the court to enter an order requiring DOI and OMB to comply with NEPA, the CEQ Guidelines, and other pertinent regulations and orders (A. 20).

During the pendency of the district court action, DOI began preparation of a "programmatic statement" discussing the operation and administration of the Refuge System, including certain funding alternatives (Pet. App. 2a). This programmatic statement examined the environmental effects of managing the System over a ten-year period at various levels of appropriations. It did not discuss any specific budget proposals.

[2] "A." refers to the appendix to the briefs filed in the court of appeals on March 19, 1976. By order of the Court entered February 21, 1979, respondents' motion to dispense with the filing of an appendix was granted.

Following initial discovery, both sides filed motions for summary judgment. The district court (per Judge Pratt) ruled in favor of the claims presented by respondents (Pet. App. 49a-58a). Judge Pratt held that budget requests of the Fish and Wildlife Service were recommendations or reports on "proposals for legislation and other major Federal actions" with a significant effect upon the environment (Pet. App. 51a-52a). Judge Pratt rejected petitioners' claims that compliance with NEPA in the budget context would not be possible and that the budget process is confidential until the President forwards the combined federal budget to Congress (Pet. App. 52a-57a).

Petitioners moved to stay the case pending completion of the programmatic statement dealing with the Refuge System, claiming that the programmatic statement would satisfy NEPA requirements (A. 579). The court refused to stay the case, holding that, although the "programmatic statement" under preparation by DOI might serve as a basis for subsequent supplemental statements and analyses, the programmatic statement did not supplant the need for an environmental impact statement (EIS) accompanying each annual budget request for the Refuge System (Pet. App. 58a). In an unpublished Order, Judge Pratt entered a declaratory judgment in accordance with his opinion and also required OMB to develop methods and procedures to comply with NEPA (Pet. App. 61a-62a).

On appeal, the court of appeals (per Judge Leventhal) reversed in part, ruling that an EIS is not required for an agency's routine request for annual budget approval and appropriations for continuance and management of an ongoing program, but that an EIS is required "when the request . . . is one that ushers in a considered programmatic course following a programmatic review" (Pet. App. 15a-18a). The court of appeals affirmed that part of the district court's opinion which required OMB to develop methods and procedures for implementing NEPA in the budget process (Pet. App. 23a). Judge MacKinnon dissented.

SUMMARY OF ARGUMENT

The National Environmental Policy Act (NEPA) embodies a congressional desire that federal agency actions such as the preparation of requests for appropriations legislation be the product of thorough consideration of their potential environmental consequences. Congress was familiar with the policy implications of agency budget decisions, and intended those critical decisions to be influenced by the consideration of environmental factors. Congress desired budget requests which usher in a considered programmatic course following a programmatic review of ongoing programs to be accompanied by environmental impact statements demonstrating that environmental concerns have been considered in the decision-making process.

The plain language of Section 102(2)(C) of NEPA demonstrates the congressional intent to apply the environmental analysis of the impact statement to the budget process. Section 102(2)(C) directs every federal agency to include an impact statement "in every recommendation or report on proposals for legislation

and other major Federal actions significantly affecting the quality of the human environment . . . ." As the product of the Legislative branch, a congressional appropriation is "legislation." An appropriation is also a "major Federal action." Furthermore, the final agency request for budget approval and appropriations is a "proposal" as that term is used in Section 102(2)(C). Agencies are statutorily required to prepare such requests each year. The actual requests, as products of many months of intensive work and analysis, possess sufficient finality to be deemed "proposals." Inclusion of budget requests in the EIS process effectuates rather than strains the words of NEPA and the intent of Congress.

The enforcement of NEPA's procedural requirements as they apply to the budget process will not significantly burden agencies. Most agency budget requests will not be accompanied by impact statements due to the incremental nature of the budget process. An agency need prepare an impact statement only when its budget request proposes a significant change in an ongoing program, after a careful review of that program. The agency will have adequate time within which to prepare the required statement. Recently adopted CEQ Regulations will further simplify and ease compliance with NEPA as applied to the budget process. Most important, federal decisionmaking will be improved in the manner intended by Congress.

The federal budget process is amenable to NEPA compliance. Confidentiality is not built into the budget process by constitutional requirement, statutory mandate or practical necessity. Public disclosure of impact statements on legislative proposals normally awaits Presidential transmission of the proposals to Con-

gress. Even if advance disclosure is required, such disclosure would not prevent the President from carrying out his duties, and may enhance his performance of them. The Budget and Accounting Act of 1921 sets up a process by which agency budget requests are submitted to Congress through the President. That Act does not require the exclusion of all information in those requests from environmental impact statements until the President forwards the combined federal budget to Congress. There is no evidence and no policy which indicate that the budget process will work less efficiently if impact statements are prepared and made available prior to transmission of the budget to Congress. In any event, NEPA has proven sufficiently flexible to allow for compliance with its procedural requirements while still preserving any necessary confidentiality.

Section 102(2)(B) of NEPA requires OMB, the principal agency charged with supervision of the budget process, to identify and develop methods and procedures by which agencies will be guided in their compliance with NEPA as applied to the budget process. Congress intended for OMB to play a central role in guiding agencies in their efforts to meet their budgetary duties under NEPA. OMB has demonstrated its ability to provide such guidance. Furthermore, respondents have standing to pursue this claim. The absence of OMB guidelines has led to a failure by agencies to identify and meet their responsibilities under NEPA with respect to preparation of impact statements on budget requests. As a result, respondents have suffered substantive and procedural injuries.

ARGUMENT

I. CONGRESS INTENDED TO APPLY THE PROCEDURAL REQUIREMENTS OF SECTION 102(2)(C) OF THE NATIONAL ENVIRONMENTAL POLICY ACT TO THE AGENCY BUDGET PROCESS.

Congress passed the National Environmental Policy Act (NEPA) in 1969 to provide all federal agencies and officials with a clear and forceful "legislative mandate and a responsibility to consider the consequences of their actions on the environment." S. Rep. No. 296, 91st Cong., 1st Sess. 14 (1969). Congress intended that adequate consideration of environmental concerns in decision-making processes characterize "the ongoing activities of the regular Federal agencies." *Id.*

In enacting NEPA, Congress recognized that federal actions could have significant direct and indirect effects on the environment, but that the decisions which lead to those actions often are made with only occasional and incidental consideration of their potential environmental consequences. NEPA's strong response, a government-wide policy of restoring, protecting and enhancing the nation's environment by the use of "all practicable means," 42 U.S.C. § 4331(a), is more than a hollow declaration. Congress "did not intend the Act to be . . . a paper tiger." *Calvert Cliffs' Coordinating Committee, Inc. v. AEC,* 449 F.2d 1109, 1114 (D.C.Cir. 1971). The procedural requirements of NEPA establish a high standard for all agencies; one which must be vigorously enforced. *Id.* [3]

[3] "When the Congress required environmental impact statements it was because previous practice was inadequate—agencies' planning and decisionmaking procedures had ignored or misjudged significant environmental impacts and would continue to do so unless a publicly accountable document was prepared and its criticism considered *before taking* a major action" [1975] CEQ Ann. Rep. 628 (emphasis added).

A. NEPA Embodies a Clear Congressional Intent to Consider Environmental Factors in Federal Decisionmaking.

In the decade since its passage NEPA has fundamentally altered the processes of federal decisionmaking. Compliance with the procedural, "action-forcing" requirements of NEPA—which were intended to ensure consideration of the environmental effects of proposed and alternative courses of action—has led to substantial improvements in federal decisions affecting the environment.[4] More important, NEPA's objective of helping to protect and enhance the quality of the human environment has been accomplished. Note, *NEPA's Forgotten Clause: Impact Statements For Legislative Proposals,* 58 B.U.L. Rev. 560, 561 (1978). In short, at a time when the Executive and Legislative branches of our government have emphasized the need to be management oriented (by the use, for example, of economic analyses, zero-based budgeting and cost/benefit approaches), the action-forcing mandate of NEPA is an invaluable management tool.[5]

[4] The Council on Environmental Quality (CEQ) so reported to the President in March, 1976, after concluding a year-long study of federal agencies' experience in implementing Section 102(2)(C) of NEPA. Council on Environmental Quality, Environmental Impact Statement: An Analysis of Six Years' Experience by Seventy Federal Agencies 21-25 (1976) [hereinafter cited as Analysis].

[5] Agencies' efforts to use NEPA in this way have been successful. For example, the National Park Service reported in 1975 that its implementation of NEPA had allowed "[m]anagers at all levels [to] make better informed decisions (' . . .') In these times of fiscal restraints, we also ensure that we are not duplicating services

Section 102(2)(C) of NEPA requires every Federal agency to prepare an environmental impact statement (EIS) for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Petitioners now seek judicial approval for a complete exemption of the federal budget process from the procedural requirements of NEPA.[6] Under their interpretation, a request

provided by others and thus spending funds unnecessarily." Analysis, *supra* note 4, at E-1. The Service also emphasized that:

> NEPA has sharpened our planning process. It has become more systematic, comprehensive, and provides an umbrella or structure for a myriad of management actions we must take daily. Long term, this comprehensive planning will reduce costs, minimize labor requirements for operation and maintenance of facilities, and aid us in mitigating our adverse actions as well as provide us with a system for monitoring our past decisions. *Id.* at E-2.

Referring specifically to EISs, the Park Service described them as "useful tools in helping us reach our objectives," and concluded:

> [I]f we use NEPA as a decisionmaking management tool rather than thinking of it as a nemesis, our decisions will be of greater benefit to the resources we manage and the public we serve.

Id.

[6] The procedural posture of the instant case makes it difficult for respondents to pinpoint exactly what petitioners are requesting of the Court as to the first question presented. The issue below was whether routine annual budget requests must be accompanied by environmental impact statements. This issue was resolved in favor of petitioners and has not been appealed by respondents. Indeed, the court of appeals adopted a position advocated by petitioners (that "the programmatic EIS is . . . an acceptable method

for budget approval and appropriations which "proposes a considered programmatic course following a programmatic review" (Pet. App. 23a), is not a recommendation or report on a proposal for legislation [7] or

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of complying with NEPA in circumstances of annual budget-making") (Brief for Appellants at 33), a position petitioners now reject in claiming that they have *no* duty under NEPA with regard to proposals for appropriations legislation.

Notwithstanding petitioners' assertion that the court of appeals' judgment will require them to prepare additional impact statements (Brief for Petitioners at 22, n.15), there is no case before the Court in which any agency has failed to prepare a required EIS. The court of appeals expressly noted that there was no issue before it regarding "whether, or in what instance, a 'new look' may be required" (Pet. App. 17a). Petitioners, having no facts upon which to base their arguments, have been forced to argue the theoretical issue of a complete exclusion of the budget process from NEPA.

[7] The requirement of the impact statements for legislative proposals, including proposals for appropriations legislation, has gone largely unheeded since NEPA's passage. *See generally,* Note, *NEPA's Forgotten Clause: Impact Statements for Legislative Proposals,* 58 B.U.L. Rev. 560 (1978) [hereinafter cited as Note]. In addition to characterizing the court of appeals' decision as one which "both supports the policy behind NEPA and evinces a sensitivity for the practical difficulties of preparing an EIS" (*id.* at 566), the author of the Note, after reviewing the legislative history of NEPA and judicial efforts to articulate situations where an EIS would be required, emphasizes:

> In NEPA, Congress has determined an efficient balance; the courts should not attempt to tip the scales by interpreting the legislative proposal provision narrowly. If there is any question whether an EIS should issue, the statement should be prepared, and Congress should decide the proper use for the information.

Id. at 568.

See also Comment, *Impact Statements on Legislative Proposals: Enforcing the Neglected Half of NEPA's Mandate,* 7 ELR 10,145 (1977); Comment, *NEPA and the Budget Process: D.C. Circuit Announces EIS Requirement Applies to 'Non-Routine' Annual Requests,* 8 ELR 10,126, 10,129 (1978) ("[t]he Court's ruling seems to strike a reasonable balance between applying the broad language of the Act concerning impact statements for 'proposals for legislation' and avoiding the pitfalls of trivializing the EIS process and undercutting the traditional confidentiality of budgetary requests.")

for major Federal action.[8]

Petitioners incorrectly imply that Congress intended to exclude the budget process entirely from the provisions of NEPA (Brief for Petitioners at 37-39).[9] In so

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[8] Respondents have always argued this first issue in the alternative: that a request for appropriations legislation is either a recommendation or report on a proposal for legislation or on a proposal for major Federal action. *See* Brief for Appellees at 24 *et seq.* Both petitioners' statement of Question 1, and their Brief in substance, except note 34, fail to discuss this other important dimension of Section 102(2)(C); although there seems to be implicit recognition in note 34 that agency requests for budget approval and appropriations may, in some contexts, fall within this provision, if the budget submission constitutes a "proposal." *See* discussion, *infra* at 38-41.

[9] Any intent by Congress to exclude such a major and commonly accepted function of the legislative process from the strong mandate of NEPA, which twice has been before the Congress for amendment, would have been clearly stated. Insofar as the legislative proposal provision is concerned, the legislative history does not reflect careful consideration of any definition of the word

doing, petitioners ignore the express policy of NEPA, as well as the clear congressional intent regarding the role of the impact statement procedure. Further, the consistent interpretations of the Council on Environmental Quality (CEQ), which was established by NEPA, and of every court which has ruled upon the coverage of Section 102(2)(C), are squarely at odds with petitioners' contention. By construing NEPA in a vacuum, petitioners have failed adequately to consider the overall purposes of the Act.

NEPA was passed "to establish, by Congressional action, a national policy to guide Federal activities which are involved with or related to the management of the environment or which have impact on the quality of the environment." S. Rep. No. 296, 91st Cong., 1st Sess. 8 (1969). The Senate Committee which forwarded NEPA to the full Senate unanimously agreed that established public policies and existing government institutions were inadequate to deal with mounting environmental problems. *Id.* at 4. This relevant statutory language and legislative history is important to demonstrate that NEPA was created as the vehicle by which federal decisions would be infused with an environmental element.

Congress did not limit itself to a statement of policy in NEPA. In Section 102(2)(C) it required that agencies prepare environmental impact statements in conjunction with "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Senator Jackson, the leading proponent of NEPA in the Senate, called the impact statement requirement an "action-forcing procedure" designed to ensure that the goals and principles of NEPA were observed. 115 Cong. Rec. 19009 (1969) (remarks of Sen. Jackson).[10]

Federal agencies are directed by NEPA to achieve the goals of Section 101 by considering environmental values and effects in both the planning and decision-making processes. Congress realized that compliance with Section 102(2)(C) might be difficult for some agencies; and that agencies would be tempted to escape NEPA's clear mandate by pleading administrative burden. Nevertheless, Congress required strict compliance "to the fullest extent possible." 42 U.S.C. § 4332. It was intended that an agency would comply with the requirements of Section 102(2)(C) "unless the existing law applicable to such agency's operations does not make compliance possible." *See* H.R. Rep. No. 765, 91st Cong., 1st Sess. 9 (1969) (conference report). Furthermore, agencies were not to construe their existing statutory authorizations in a manner designed to avoid com-

"proposal" or of the phrase "recommendation or report on." The only reference to the provision is contained in a statement in the Senate Report that "[e]ach agency which proposes *any* major actions, such as project proposals, *proposals for new legislation*, regulations, policy statements, or expansion or *revision of ongoing programs*" would consider the potential environmental consequences of the action, and would prepare an EIS if necessary. S. Rep. No. 296, 91st Cong., 1st Sess. 20 (1969) (emphasis added).

[10] The role of the impact statement as an "action-forcing" procedure was repeatedly emphasized. *See, e.g.*, S. Rep. No. 296, 91st Cong., 1st Sess. 9 (1969); *id.* at 19; 115 Cong. Rec. 40,416 (1969) (remarks of Sen. Jackson). *See also National Environmental Policy: Hearing Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 116 (1969) (statement of Lynton K. Caldwell); Peterson, *An Analysis of Title I of the National Environmental Policy Act of 1969*, 1 ELR 50,035, 50,040 (1971).

pliance. *Id. See Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 787-88 (1976); *Davis v. Morton,* 469 F.2d 593, 598 (10th Cir. 1972).

In sum, the purposes of NEPA are best served by the preparation of impact statements whenever proposed federal actions may have a significant effect on the environment. Decisions which will have no significant effect on the environment are, of course, exempt from the EIS requirement. But the intent of Congress is defeated when environmental factors are not considered before commitments to courses involving potentially serious environmental effects are, as a practical matter, not likely to be altered. Such a commitment is inherent in an agency's final request for budget approval and appropriations, which "proposes a considered programmatic course following a programmatic review" (Pet. App. 23a). The agency's failure to provide for consideration of the important environmental consequences of budget decisions is contrary to the statutory language and the legislative history of NEPA.

B. An Agency's Budget Request May Involve Environmental Consequences Which Congress Intended to be Examined by the Agency in an EIS.

The budget process is a crucial tool of policymaking. Before the President formally transmits the combined federal budget to Congress, the final decision made by an individual agency in preparing and presenting a final budget proposal for congressional consideration has already had broad policy ramifications. This is particularly true when the agency undertakes a thorough, non-routine review of an ongoing program in connection with its proposal for appropriations legislation. In the words of the court of appeals, "[a] review of such a nature reflects choices that should under NEPA be made in the light of a full consideration of pertinent environmental consequences and alternatives" (Pet. App. 17a). Judge MacKinnon in his dissent recognized that such non-routine requests would warrant the preparation of an EIS. His view, however, was that "in this case . . . merely . . . a routine, continuing [annual] request for funding" had been initiated (Pet. App. 42a). He also suggested that "where a decision is made to request no funding at all, thus terminating a program, perhaps such action could plausibly be considered 'major' . . ." (*id.*), thereby requiring preparation of an EIS.

While the legislative history is sparse regarding the application of the procedural safeguards of Section 102(2)(C) to the budget process, it is logical to assume that application was intended. Not only was Congress fully aware of the critical agency decisions involved in budget requests, but it also specifically intended the Budget Bureau (OMB) to play a major role in implementing environmental standards under NEPA throughout the federal establishment. The Senate Committee explicitly noted that the Bureau of the Budget,[11]

[11] At the time of the enactment of NEPA, the Bureau of the Budget was still in existence. The Bureau was created by an Act of Congress in 1921. Budget and Accounting Act of 1921, Ch. 18, Section 207, 42 Stat. 22. In Reorganization Plan No. 1 of 1939, 53 Stat. 1423, the Bureau of the Budget was transferred from the Treasury Department to the Executive Office of the President. In Reorganization Plan No. 2 of 1970, 84 Stat. 2085, the Bureau of the Budget was abolished and its budgetmaking functions were transferred directly to the President, who then delegated this responsibility to the newly established OMB. Exec. Order No. 11,541, 35 Fed. Reg. 10,737 (1970).

which performed oversight and assessment functions, had proven to be more adept in considering fiscal, rather than environmental, factors. S. Rep. No. 296, 91st Cong., 1st Sess. (1969). Nevertheless, the new Office of Management and Budget (OMB) was expected to assume the primary responsibility for enforcing the legislative clearance programs. *National Environmental Policy: Hearings Before the Senate Comm. on Interior and Insular Affairs,* 91st Cong., 1st Sess. 116-17 (1969) (remarks of Sen. Jackson and Dr. Lynton K. Caldwell).[12]

Since annual agency budget requests of the kind articulated by the court of appeals will invariably involve environmental impacts and the irreversible and irretrievable commitment of resources, those proposals logically were intended to be covered by Section 102 (2)(C) as either proposals for legislation or for major Federal action. It is unlikely that Congress intended to infuse environmental awareness into every segment of federal decisionmaking, except the influential budget

[12] Congress recognized that "[l]ong range plans requiring legislative implementation over time are especially suitable for a NEPA analysis," W. Rogers, Environmental Law § 7.2, at 715 (1977), and that this would include "quite clearly appropriations requests." *Id.* at 714-15. Only when OMB demonstrated its reluctance to undertake a significant oversight role did CEQ assume that position. *Id.* at 705. From the very start and through two revisions of CEQ's Guidelines, a central role was contemplated for OMB. *See* [1970] CEQ Ann. Rep. 286, 287 (CEQ Interim Guidelines) ("The Bureau of the Budget will issue instructions, as necessary, to take full advantage of existing mechanisms (relating to procedures for handling legislation, preparation of budgetary material . . .)"); 36 Fed. Reg. 7,724, 7,724 (1971) (providing for federal agency assistance from OMB in the development of procedures which, *inter alia,* would identify those agency actions requiring EISs); and the current Guidelines, 40 C.F.R. §§ 1500.3(b), (c) (1978), which technically are in effect until July 30, 1979.

process. No court or commentator has so suggested; nor, until its recent aboutface, has CEQ, the entity specifically entrusted with interpreting the meaning of the action-forcing mandate in NEPA.[13]

The affidavits submitted by Government officials in the instant case demonstrate the thoroughness and complexity of agency budgetary decisionmaking, as well as the finality of the agency's budget request when it is forwarded to OMB. The affidavit of Royston C. Hughes is demonstrative (Pet. App. 73a-78a). The final agency budget request is not the result of ill-informed, last-minute decisions. Rather, an agency undertakes a thorough examination of its programs for up to nine months of each year. Agency officials at the bureau and office levels participate in discussions leading up to the final budget request (*id.* at 76a). These discussions include consideration of departmental "priorities and issues" presented in Program Strategy Papers (*id.*).

By the end of August (four months before the President's transmission of his combined federal budget to Congress), the agency head must make "*final* decisions . . . as to the allocation which the Department would recommend to the Office of Management and Budget . . ." (*id.*) (emphasis added).

The final budget document is forwarded to OMB by the end of September. For the next few months, conferences between the Department and OMB merely establish budget allowances for each Bureau and Office (*id.* at 77a). Although the combined federal budget is formally submitted by the President, the overall changes by both OMB and the President are relatively

[13] *See* discussion, *infra* at 26-33.

minor after the final decisions within the agency have been made in September. An agency head may appeal any changes in his/her final request. Moreover, petitioners have admitted that, at least for the past four years, no major changes were made after the agency budget request for the NWRS was submitted to OMB by the Department of the Interior (Brief for Petitioners at 10 n.6).[14] In short, the final agency budget request is an accurate projection of the ultimate allocation of resources, and is essentially the same budget as that which the agency submits to Congress through OMB and the President.

The agency budget process is not just a study in fiscal management; important policy decisions are made throughout the nine months of careful budgetary soul-searching. The non-budgetary policy implications of the budget process are greater today than they have ever been.[15]

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[14] According to Curtis Bohlen, the Assistant Secretary of Interior for Fish and Wildlife and Parks, the final budget estimates of the Secretary of Interior "resemble very closely both in nature and form the Justification for Appropriations which are [sic] ultimately sent to Congress for each Bureau and agency." (Affidavit of Curtis Bohlen at 3).

[15] The tremendous policy influence of the budget in recent years is due in large measure to its size. Charles Schultze, currently Chairman of the Council of Economic Advisors, has pointed out that the increasing percentage of GNP devoted to the federal budget has given the budget process a far greater role in shaping social policy than was the case only 30 years ago. C. Schultze, The Politics and Economics of Public Spending 14-15 (1968). *See also* H. R. Rep. No. 697, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U. S. Code Cong. & Ad. News 2778, 2783 (federal budget in 1974 was nearly 100 times larger than the budget at the time when the Budget and Accounting Act was passed in 1921); D. Ott and A. Ott, Federal Budget Policy 1 (3d ed. 1977).

Congress recognized the policy implications of budget formation in 1974 when it amended the Budget and Accounting Act to provide for Senate confirmation of the Director and Deputy Director of OMB. *See* Act of March 7, 1974, Pub. L. No. 93-250, 88 Stat. 11. The House Report said:

> [T]he budget is the great judgment book for Federal agencies and activities, recording which shall live and which shall die, which shall prosper and which shall wane. Unlike the situation 50 years ago, when the mix of Federal activities varied little from year to year, the budget now is the 'action forcing' process, involving new program decisions and billions of dollars each year.

H.R. Rep. No. 697, 93d Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 2778, 2784. The use of the specific term "action forcing" in the Report is especially significant, for the same term was used in the Senate Report accompanying NEPA to describe the impact statement requirement. *See* discussion at 17 *supra*. Just as the procedural requirements of the budget process force policymakers systematically to consider fiscal issues, so the procedural requirements of NEPA force the same policymakers carefully to consider environmental factors. Congress did not intend the process whereby federal agencies and activities "live and die" to be excluded from the "action-forcing" procedures of NEPA.

Budget decisions have substantial effects on the environment. For example, when budgetary levels for particular Wildlife Refuges are lowered, "the result is generally to reduce sharply the ability of the refuge to support wildlife populations and ultimately to require the replacement of facilities at much higher cost

than that of maintenance and rehabilitation." (Affidavit of John S. Gottschalk, former Director of the Fish and Wildlife Service, A. 407).[16] Congress established the EIS requirement to ensure that significant agency policymaking would include careful consideration of such environmental effects. Environmental effects are, ultimately, economic effects.

Petitioners' view that the budget process is excluded from NEPA is blatantly inconsistent with congressional intent and an understanding of the process itself. The court of appeals' interpretation of Section 102(2)(C) is both sensible and appropriate. Petitioners' contention requires a strained and incorrect application of the language of NEPA.

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[16] As one professional wildlife refuge administrator, long involved in the budgetary processes of the Fish and Wildlife Service has stated:

> The various component programs in the refuge system's budget contribute directly to either the preservation and conservation of wildlife, including near-extinct species; to the management of wildlife habitat; or to the educational and recreational use of the refuges by the public . . . Thus, decisions whether or not to include hunting programs as a part of the refuge program and concomitant decisions whether or not to provide staff to regulate and supervise such hunting programs have significant environmental effects. Similarly, budgetary decisions to vacate refuges may involve direct losses in wildlife production; decisions to defer purchases of disappearing wetlands may contribute directly to the loss of the national migratory bird populations; decisions to eliminate staffing for active management of wildlife habitat may mean such deterioration of habitat that wildlife is lost; deferment of a program for maintenance and rehabilitation of facilities such as water impoundments may mean the direct loss of wildlife habitat and diminished wildlife production; and decisions to eliminate access to certain size or low priority refuges directly affects public use of such refuges for educational and recreational purposes.

(Affidavit of Harry B. Crandell, A. 398).

II. NEPA REQUIRES THE PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT TO ACCOMPANY AN AGENCY REQUEST FOR BUDGET APPROVAL AND APPROPRIATIONS WHERE THE REQUEST PROPOSES A CONSIDERED PROGRAMMATIC COURSE FOLLOWING A PROGRAMMATIC REVIEW OF AN ONGOING PROGRAM.

A. The Plain Language of Section 102(2)(C) Requires Federal Agencies to Prepare Environmental Impact Statements to Accompany Certain Budget Requests.

1. For Purposes of NEPA, an Appropriation by Congress Is Either Legislation or Major Federal Action.

Under the language of Section 102(2)(C), the impact statement requirement is applicable to the budget process if an agency budget request is either:

> i) a recommendation or report on a proposal for legislation; or
>
> ii) a recommendation or report on a proposal for major Federal action.

42 U.S.C. § 4332(2)(C). Petitioners contend that an appropriation is neither legislation nor a major Federal action (Brief for Petitioners at 34, 45 n.34).[17]

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[17] In their Answer petitioners challenged respondents' standing to sue by a general denial that petitioners had any plans to reduce the funding of the National Wildlife Refuge System with consequent impairment of the Refuge System (Pet. App. 9a). However, petitioners now concede "that respondents have standing to claim that an EIS is required under Section 102(2)(C) in the context of this case . . ." Brief for Petitioners at 60). As petitioners now agree, members of respondents' organizations use the wildlife refuge areas; their use may be adversely affected by the allocation of funds available for operation of the Refuge System; and their injury fairly can be traced to petitioners' actions through the failure to comply with the procedural requirements of NEPA (Brief for Petitioners at 59-60). Respondents so pleaded in their

Petitioners rely heavily on regulations promulgated recently by the Council on Environmental Quality (CEQ) (Brief for Petitioners at 39-44). But these regulations are meaningless unless studied in the light of past administrative history. When so examined, it becomes clear that the new regulations, insofar as they exclude budget requests from coverage under NEPA, are tainted by litigation motive, and hence without value as interpretive tools.

a. The CEQ guidelines and regulations.

On March 5, 1970, the President issued an executive order directing CEQ to issue guidelines to federal agencies for the impact statement process. Exec. Order No. 11,514 § 3(h), 35 Fed. Reg. 4,247, 4,248 (1970). Pursuant to the Order, CEQ promulgated Interim Guidelines on April 30, 1970—just four months after NEPA was signed into law. Under the Guidelines, an environmental impact statement was required for any proposed action. The word "actions" (as in "major Federal actions") was defined to include, among other things, "recommendations or reports relating to legislation and appropriations," as well as "policy-making." *See* [1970] CEQ Ann. Rep. 288.

These Guidelines were revised within a year, and the definition of "actions" was altered slightly to include, in addition to "policymaking," "recommendations or favorable reports relating to legislation including that

complaint before the district court (A. 8-11). This establishes standing. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *United States v. SCRAP*, 412 U.S. 669, 686 n.13 (1973) (SCRAP I); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

for appropriations." 36 Fed. Reg. 7,724, 7,724 (1971). The use of the word "that" rather than "those" shows the intent to include appropriations in the term "legislation."

In August, 1973, the Guidelines were once again revised. "Actions" now were defined to include both "recommendations or favorable reports relating to legislation including requests for appropriations" and "the making, modification, or establishment of . . . policy." 40 C.F.R. § 1500.5(a)(1) (1978), 38 Fed. Reg. 20,550, 20,551 (1973).[18]

[18] The date of proposal of the 1973 guidelines is significant. CEQ's May 2, 1973 proposal came after more than three years of experience with NEPA during which time CEQ's Guidelines dealt specifically and solely with the EIS requirements under Section 102(2)(C). Further, the May 2, 1973 proposal followed five months on the heels of then Judge McCree's unequivocal holding in *Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1181 (6th Cir. 1972), that budget requests were proposals for legislation within the terms of NEPA. Moreover, on June 12, 1973, the United States Court of Appeals for the District of Columbia Circuit decided *Scientists' Institute for Public Information, Inc. (SIPI) v. AEC*, 481 F.2d 1079, 1088 (D.C. Cir. 1973) to the same effect. Nevertheless, CEQ retained its definition of actions to include "recommendations . . . relating to legislation including requests for appropriations."

Further, the preamble to the final 1973 Guidelines (August 1, 1973) noted that CEQ had received "numerous comments on its proposed guidelines from environmental groups, *Federal*, State and local *agencies*, industry and private individuals." 38 Fed. Reg. 20,550, 20,550 (1973) (emphasis added). CEQ also stated that, in addition to the theme of increasing the opportunity for public participation in the EIS process, commentators had emphasized the need for "more detailed guidance on the responsibilities of Federal agencies *in light of recent court decisions interpreting NEPA.*" *Id.* (emphasis added).

Thus, it fairly can be assumed that CEQ was well aware of the then recent holdings in *TVA* and *SIPI* at the time of final

The definition of "actions" was altered slightly in both revisions of the Guidelines after extensive public and agency comment, evidencing careful consideration of the scope of the impact statement requirement. Nevertheless, the application of NEPA to requests for appropriations never changed. From 1970 to 1978, CEQ, on three occasions, expressed its consistent opinion that impact statements were required to accompany budget requests.[19]

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promulgation of the 1973 Guidelines. CEQ's Annual Report discussed *SIPI* at some length, characterizing it as "one of the most significant NEPA decisions of the past year." [1973] CEQ Ann. Rep. 241. It also stated that "[t]he revised version incorporates much of NEPA's legal evolution in the courts over the past two years . . ." *Id.* at 234. Nevertheless, those final Guidelines—which remain in force today—retained the provision under discussion here. Under these circumstances, the Court should give great weight to those contemporaneous interpretations by CEQ of NEPA.

[19] Although CEQ during the eight-year period promulgated only non-binding guidelines, most federal agencies promulgated regulations to govern their NEPA compliance. Many agencies explicitly included budget requests among the activities requiring impact statements. For example, the Department of Interior said that actions requiring impact statements included "recommendations or favorable reports to the Congress relating to legislation including appropriations" and that any proposed action with an environmental impact "likely to be highly controversial should be considered to require an environmental statement." 36 Fed. Reg. 19,343, 19,344 (1971) (addition to Department of Interior Manual). These internal regulations are still in effect. The Department of Defense has similar regulations which, in part, require that, "[f]or those budget items which are identified as having a significant effect on the environment, or which are controversial, an environmental impact statement shall be prepared which will accompany the budget request." 32 C.F.R. § 214.6(d)(1)(ii) (1978). These internal regulations are binding on the agencies. *Service v. Dulles*, 354 U.S. 363, 387-89 (1957); *accord, Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 276 (1969).

The court of appeals based its holding, in part, on the 1973 CEQ Guidelines. However, in 1977, the President amended the earlier Executive Order to empower and to require CEQ to issue binding regulations which would establish uniform procedures for implementing the procedural provisions of NEPA. Exec. Order 11,991 § 1, 42 Fed. Reg. 26,967 (1977). The new Regulations were promulgated in final form on November 29, 1978, 43 Fed. Reg. 55,978 (1978), with an effective date of July 30, 1979.

Petitioners contend that reliance on the existing Guidelines is unwarranted and assert that, under the new Regulations, budget requests are no longer considered proposals for legislation (Brief for Petitioners at 40). Petitioners refer specifically to the new definition of "legislation," a term previously undefined in the Guidelines, which specifically excludes "requests for appropriations." 43 Fed. Reg. 56,004 (1978) (to be codified in 40 C.F.R. § 1508.17).[20] They suggest that the Regulations "will *ordinarily* be accorded substantial weight by the courts . . . ." (Brief for Petitioners at 43) (emphasis added). While we generally agree, the weight to be given to this one provision containing the new definition must depend on the timing, the circumstances and, ultimately, the validity of its promulgation. This validity is highly questionable here.

The weight which the new Regulations will deserve should not be accorded the provision under scrutiny. CEQ admitted that its new definition of legislation

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[20] Subsequent citations to the new CEQ Regulations will contain the section of the new 40 C.F.R., followed by the page reference in the Federal Register, *e.g.*, § 1505.2, 43 Fed. Reg. 55,692. Citation to comments will be to pages in 43 Fed. Reg. only.

"is the one instance in the regulations where we assert a position opposed to that in the predecessor Guidelines," and recognized the pendency of the instant case. 43 Fed. Reg. 55,989.[21] CEQ explained its complete "flip-flop" on the grounds that, "in its experience . . . preparation of impact statements is ill-suited to the budget preparation process." *Id.* However, the source of CEQ's "experience" with budgetary impact statements is, at best, unclear, since CEQ reported that no impact statements have ever accompanied requests for appropriations legislation. *Id.* Moreover, CEQ cited no newly-discovered legislative history to justify this complete aboutface. *See General Electric Co. v. Gilbert,* 429 U.S. 125, 145 (1976). Rather, it shunted aside the duty to consider environmental factors which NEPA mandates for agencies—an approach to the interpretation of NEPA which has been expressly rejected by the Court. *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 787 (1976).[22]

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[21] In the proposed regulations, issued less than a month after the court of appeals' decision, CEQ also cited the instant case, stating that "in consultation with OMB [it] had been prepared to propose this [new] wording." 43 Fed. Reg. 25,245 n.1.

[22] CEQ also based its new interpretation of NEPA's mandate upon "traditional concepts relating to appropriations and the budget cycle, considerations of timing and confidentiality, and other factors . . ." 43 Fed. Reg. 55,989. This justification goes wholly unexplained. Since the new regulations offer the widest latitude regarding the timing and form of EISs (Part 1502, 43 Fed. Reg. 55,994 *et seq.*) the classification of confidential data (§ 1507.3(c), 43 Fed. Reg. 56,003) and the method of preparing legislative impact statements (§ 1506.8, 43 Fed. Reg. 56,001-02), the "explanation" offered by CEQ provides an inadequate basis for the dramatic shift in policy.

Petitioners' reliance on cases demonstrating "new developments" is unfounded (Brief for Petitioners at 44). None were articulated by CEQ, and it can fairly be assumed that there were none. The only new circumstance to arise since 1973 that would explain CEQ's abrupt reversal on the provision defining legislation is respondents' success in the instant suit. Little, if any, weight should be given a statutory construction motivated by such considerations.[23] Any interpretation

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[23] When CEQ proposed the new Regulations, it requested *public comment* on them. Respondents inspected the comments submitted to CEQ and were able to find only two, besides their own, that dealt with the new definition of "legislation." Both of these opposed the CEQ interpretation. Comments of the Attorney General of the State of New York, August 11, 1978, at 14; Comments of the Environmental Defense Fund, August 8, 1978, at 8. Respondents informally requested access to agency comments on the new proposed definition, but were denied such access.

Respondents then sent requests for the same information under the Freedom of Information Act, 5 U.S.C. § 552 (1976), to several agencies. CEQ denied access to agency comments on the new proposed definition, citing the "inter-agency memorandum exception" to FOIA. 5 U.S.C. § 552(b)(5); letter from Robert B. Nicholas to James H. Cohen, March 13, 1979. OMB denied access to its comments submitted to CEQ on similar grounds. Letter of Velma N. Baldwin to James H. Cohen, March 9, 1979.

However, the inter-agency memorandum exception was obviously unpersuasive to both the Department of the Interior (DOI) and the Department of Agriculture (DOA). They granted respondents complete access to all of their comments on the new Regulations, including those relating to the definition of "legislation." Letter of Bruce Blanchard to James H. Cohen, March 15, 1979 (DOI) (comments generally favorable to new CEQ Regulations, as might have been expected from this petitioner); letter of Glen H. Loomis to James H. Cohen, March 13, 1979 (DOA) (no discussion of new definition of "legislation"). One can only speculate why CEQ and OMB denied respondents' request, when DOI and DOA were willing to honor it. It serves no useful purpose here to articulate the

of Section 102(2)(C) other than that in the Guidelines—which should be given great weight—must be derived from direct examination of the Section's language.

The Court has always shown deference to the interpretation of an act by the agency charged with such interpretation, but it has given special weight to interpretations which are *contemporaneous* to the enactment of the governing statute. *Udall v. Tallman,* 380 U.S. 1, 16 (1965); *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 315 (1933). This is particularly true where a more recent interpretation (here, the CEQ regulation promulgated more than eight years after the enactment of NEPA) sharply conflicts with a consistent pattern of contemporaneous interpretations of the same statutory provision, which were thoroughly considered before their issuance and reissuance. *See Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).[24] The validity of CEQ's Regulations relating to budget requests has not been tested in court, whereas the essential correctness of the pertinent provisions in the Guidelines has been repeatedly affirmed.

Recently, the Court was unwilling to give effect to a 1972 agency guideline when it conflicted with earlier pronouncements of that agency and contained no suggestion that some new source of legislative history has been unearthed to justify the more recent, but sharply conflicting, interpretation. *General Electric Co. v. Gilbert,* 429 U.S. 125, 142-145 (1976). *Gilbert* is relevant to the instant case. There, as here, the later agency pronouncement was not a contemporaneous interpretation of a statute. There, as here, the later pronouncement flatly contradicted contemporaneous constructions of over nearly a decade. *Id.* at 142-143. Therefore, the new CEQ regulation defining "legislation" deserves little deference, in view of prior guidelines and the circumstances surrounding its issuance.

legal basis for our position that such documents are not exempt under FOIA. In the words of Senator Muskie, a principal proponent of NEPA, "regulations can be influenced without accountability, without minutes, without a record." *Washington Post,* Feb. 28, 1979 at A2, Col. 2.

[24] The consistent interpretations were made entirely within the period during which CEQ was responsible for issuing guidelines on only one provision of NEPA, Section 102(2)(C), while its new Regulations address all nine subdivisions of Section 102(2).

b. "Legislation" includes appropriations.

Petitioners contend that there is no indication that Congress used the word "legislation" "loosely" in Section 102(2)(C) to include appropriations (Brief for Petitioners at 37). As proof of this fact, petitioners point to certain procedural rules of the House and Senate which supposedly prove that Congress, in using the word "legislation" in substantive enactments, never means to include appropriations.

The question before the Court is not whether Congress may, for reasons related to the legislative decision-making process, distinguish between legislation and appropriations in its administrative rules. The issue is how Congress used the word "legislation" in Section 102(2)(C). As Judge McCree stated in *Environmental Defense Fund v. TVA,* 468 F.2d 1164, 1181 (6th Cir. 1972):

> Appellants claim . . . that there is a distinction between 'legislation' and annual appropriations for purposes of construing section 102(2)(C). They urge that the former refers to a change in

> existing law but the latter constitutes merely a routine authorization to disburse funds[,] . . . that the standing rules of both the House of Representatives and the Senate embody this distinction and that it can be assumed that Congress was aware of the distinction when it approved the use of the word 'legislation' in section 102(2)(C). . . .
>
> We find this contention unconvincing . . . . More significantly, the Congress may have valid reasons for distinguishing between 'legislation' and 'appropriations' for purposes of determining procedural matters such as deciding the proper committee to which to refer a bill or the time or duration of legislative debate. But that does not require us to close our eyes to the commonly accepted meaning of the word 'legislation'—the making or giving of laws—or to the clearly expressed congressional purpose of NEPA.

In construing a definite procedural provision such as Section 102(2)(C), courts have been admonished to stick closely to the text and not to import argumentative qualifications from broad, unexpressed claims of policy. *Utah Junk Co. v. Porter,* 328 U.S. 39, 44 (1946). In common parlance, the word "legislation" is not a term of art, but a description of the statutory output of legislative bodies such as Congress. *See Environmental Defense Fund v. TVA, supra,* 468 F.2d at 1181. This would include budget requests for appropriations legislation. While the legislative history of NEPA does not reflect consideration of any definition of the word "legislation," the one reference to the legislative proposal provision does at least suggest that requests for appropriations legislation were intended to be embraced within the broad category of "legislation." [25]

[25] *See* note 9, *supra.*

Further, Congress has been apprised of the holding of the district court in this case which required EISs to accompany budget requests, and has taken no action to amend NEPA. *See National Environmental Policy Act Oversight: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment,* 94th Cong., 1st Sess. 170, 175-79 (1975) (statement of Bruce J. Terris) (witness described implications of Judge Pratt's decision in the instant case). Any intent by Congress to exclude such a major and commonly accepted function of the legislative process from the strong mandate of NEPA, which twice has been before Congress for amendment, would have been clearly stated. The general counsels of federal agencies have apparently read NEPA as respondents do. The interpretation of "legislation" urged by respondents here is one adopted by numerous agencies in their regulations governing NEPA compliance. *See, e.g.,* 36 Fed. Reg. 19,343, 19,344 (1971) (addition to Department of Interior Manual) (still in effect). *See* note 19, *supra.*

If there is doubt about the meaning of this statutory term, the Court should construe "legislation" in the manner suggested by respondents, since it gives effect to the intent of Congress in passing NEPA. *Environmental Defense Fund v. TVA,* 468 F.2d 1164, 1176 (6th Cir. 1972); *Saxon v. Georgia Association of Independent Insurance Agents,* 399 F.2d 1010, 1015 (5th Cir. 1968).[26]

[26] If Congress had intended to exclude requests for appropriations legislation from Section 102(2)(C), it would have used explicit language similar to that in the new CEQ Regulations. *See* text accompanying note 20, *supra.* Indeed, the need perceived by CEQ to define "legislation" in its Regulations so as expressly to exclude appropriations indicates its implicit recognition that "legis-

The Court has recently considered the relationship of the word "legislation" to the word "appropriation." The Court said that "substantive enactments" and "appropriations measures" are "acts of Congress," but appropriations measures have a more limited and specific purpose. *TVA v. Hill,* 437 U.S. 153, 190 (1978). In *Hill,* the Court referred to "the legislative proceedings leading to the 1977 appropriations." *Id.* The product of legislative proceedings is, necessarily, "legislation."

The Court in *Hill* twice made a well-recognized distinction between appropriations and "substantive legislation." *Id.* The use by the Court of the adjective "substantive" to modify "legislation" is crucial. If legislation and appropriations were mutually exclusive terms, there would be no need to identify legislation as "substantive" in order to distinguish it from appropriations. In reality, "substantive legislation" means authorizations. As the Court noted, Congressmen need to know that, in voting on appropriations, they will not be affecting previous authorizations; otherwise they would be required "to review exhaustively the background of every *authorization* before voting on an *appropriation.*" *Id.* (emphasis added). Although this Court was not construing the term "legislation" in *Hill,* it is clear from the use of the term by the Court that the Court understood it to include appropriations. It is only logical that all actions by the "legislative branch" affecting the allocation of rights and resources would be called "legislation."

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lation" commonly includes appropriations. Congress could, of course, amend NEPA expressly to exclude requests for appropriations legislation from the meaning of "legislation."

The limits of the term "legislation" recently were tested in *Realty Income Trust v. Eckerd,* 564 F.2d 447 (D.C. Cir. 1977). There the court was faced with the question of whether the General Services Administration had to prepare an EIS at the time it presented a prospectus to congressional committees on construction of a proposed federal building. *Id.* at 450. If both the House and the Senate Committees approved the prospectus, the building would be constructed, but if either Committee disapproved, the project would be killed. *Id.* The court, in holding submission of the prospectus to be a "proposal for legislation," asserted that whatever the status of committee action in parliamentary terms, its role, in the scheme of the statute requiring it, "fully implicates NEPA's concerns and goals." *Id.* at 453. If action by a single committee in approving a prospectus can be "legislation," the action by the full Congress in approving an appropriation is certainly legislation.

Petitioners refer to procedural rules of the House and Senate to support their narrow definition of "legislation" (Brief for Petitioners at 34-35). Internal housekeeping rules are weak authority for giving meaning to a term in a substantive enactment. The rules cited, when viewed in the context of the legislative history of NEPA, are unpersuasive authority.

The rules of the House of Representatives should not be given any weight, since the House did not consider a bill containing Section 102(2)(C) until after the Conference Committee added the Senate-passed EIS provisions to the final bill. *See* H.R. Rep. No. 765, 91st Cong., 1st Sess. 8 (1969) (Conference Report). The impact statement requirement was a creation of the Senate.

Petitioners cite only one Senate Rule to support their interpretation of NEPA, Rule 16.4 (Brief for Petitioners at 34). This Rule prohibits amendments which propose "general legislation" from being considered during debate on appropriations bills. The use of "general" to modify "legislation" is as crucial as the use of the modifier "substantive" was in *Hill*. In both situations the word "legislation" is modified in order to distinguish it from "appropriations." This would not be necessary if the terms were mutually exclusive. However, they obviously are not.

Thus, petitioners are forced to defend a strained interpretation of "legislation" in order to prevail. It is more reasonable to conclude that Congress did not intend to exclude proposals for appropriations from "proposals for legislation" which require impact statements. *See* Comment, *Sierra Club Seeks to Require NEPA Impact Statements on Annual Appropriations Proposal*, 5 ELR 10,071, 10,072 (1975).

c. "Major Federal actions" include appropriations.

Even if the Court holds that appropriations are not properly characterized as "legislation," they are certainly "major Federal actions."[27] An appropriation

[27] Petitioners have mistakenly understood respondents to be claiming that Section 102(2)(C) should be read disjunctively as applicable to "proposals for legislation" on the one hand and to "other major Federal actions" on the other (Brief for Petitioners at 45, n.34). While this may have been the opinion of the district court (Pet. App. 51a), respondents make no similar contention. In our brief before the court of appeals, we argued that "annual appropriations proposals" are "*proposals* for major Federal action" (Brief for Appellees at 25) (emphasis added). We also stated that petitioners cited no cases to show that the "proposals" advanced by DOI's budget requests were not "proposals for

for a federal agency, which follows a "painstaking review of an ongoing program" (Pet. App. 17a), and, then, a request for budget approval to take an action significantly changing the status quo, *id.*, is a "major Federal action."[28] A programmatic change effected by such an appropriation is exactly the kind of appropriation to which Congress intended the impact statement requirement to apply. The budget's implementation entails policy decisions, expenditures and resource commitments of such significance (and, often, of such controversy) as to qualify the appropriations as "major Federal action" under the terms of NEPA.

The legislative history of NEPA makes clear that major changes in an agency's program or an agency's policy subsequent to intensive review of a program are

'major Federal actions.'" (*Id.* at 27). By equating proposals for appropriations with proposals for major Federal action, we implied that appropriations are "major Federal actions."

[28] Respondents use the term "ongoing program" to describe a program for which an authorization is already in force. Thus, if an agency proposed an entirely new program to Congress that would have a significant effect on the environment, an EIS would be required since the proposal for the program's authorization would be a "proposal for legislation." If a program were authorized in one year, but no appropriation were proposed until the next year, the appropriation would be for an "ongoing program," that is, a program already authorized. If the proposal for appropriations ushered in a considered programmatic course following a programmatic review, respondents maintain that it should be accompanied by an impact statement. The legislative history of NEPA indicates that every agency proposal involving the "revision of ongoing programs" would involve consideration of potential environmental consequences and, if necessary, the preparation of an EIS. *See* note 9, *supra*.

"major Federal actions." The Senate Report states that impact statements are required for "major actions, such as *project proposals,* proposals for new legislation, regulations, *policy statements,* or *expansion or revision of ongoing programs.*" S. Rep. No. 296, 91st Cong., 1st Sess. 20 (1969) (emphasis added). *See also Scientists' Institute for Public Information, Inc. (SIPI) v. AEC,* 481 F.2d 1079, 1088 (D.C. Cir. 1973).

Petitioners have not argued that the CEQ regulations, if applied to the budget process, would be incompatible with NEPA. In fact, CEQ's Regulations do not exclude requests for appropriations legislation from the definition of "major Federal action." § 1508.18, 43 Fed. Reg. 56,004. CEQ now defines "major Federal actions" to include "actions with effects that *may* be major and which are *potentially* subject to Federal control and responsibility," *id.* (emphasis added), including new and continuing programs, *id.* at 56,005, and systematic and connected agency decisions allocating agency resources to implement a specific statutory program, *id.* Appropriations for agencies are *clearly* subject to federal control and responsibility; and, in the context of the instant case, relate to allocations of agency resources resulting from systematic and connected agency decisions.

Projects of a localized nature have frequently been characterized as "major Federal actions."[29] If such

[29] *See, e.g., Scherr v. Volpe,* 466 F.2d 1027, 1033 (7th Cir. 1972) (conversion of 12 mile length of highway from two lanes to four lanes was "major Federal action"); *Lee v. Resor,* 348 F.Supp. 389, 396 (M.D. Fla. 1972) (spraying of hyacinths on St. Johns River in Florida with pesticide by Corps of Engineers was "major Federal action").

localized projects qualify for coverage under Section 102(2)(C), then appropriations of potentially nationwide scope should similarly qualify. Petitioners reason erroneously that, while budget requests relating to "discrete federal projects" may have been held to require impact statements, those decisions would not apply to an agency's general budget proposal for an entire program or activity (Brief for Petitioners at 23 n.16). On the contrary, if discrete projects are "major Federal actions," then expenditures with nationwide implications are certainly "major Federal actions." Moreover, the court of appeals' decision can fairly be characterized as limited in scope to ongoing discrete federal programs and activities involving specific and definable choices for the commitment of federal resources.[30]

In sum, an agency's considered request for appropriations legislation falls within the purview of NEPA. As either legislation or major Federal action, an appropriation fits within the terms of Section 102(2)(C).

2. An Agency's Budget Request May Be a Proposal for Legislation or a Proposal for Major Federal Action.

As a full disclosure law, NEPA makes federal decision-making more responsive and more responsible,

[30] The court of appeals did not feel it necessary to consider whether an appropriation could be a "major Federal action," since it held that an appropriation is properly regarded as legislation (Pet. App. 17a). The district court did hold that budget requests are "major Federal actions" (Pet. App. 51a). Furthermore, Judge MacKinnon, in dissent, said that a budget request made for the first time and initiating a new program, or cutting off funds to an existing program, might be "major" (Pet. App. 42a). If the Court agrees with petitioners that an "appropriation" is not "legislation," this independent basis for coverage under Section 102(2)(C) would have to be examined.

while advising the public of the environmental consequences of proposed activities. In drafting NEPA, Congress realized it would ill serve the policy and objectives of the Act if impact statements were required only to *accompany* enacted legislation or the implementation of other major Federal actions, rather than to precede such final actions. For one, Congress was not required to prepare impact statements. Therefore, an EIS would never be prepared for a bill. As for other major Federal actions, if no impact statements were prepared until the actions took place, the statements and their environmental reviews would amount to *post-hoc* rationalizations which Congress wished to avoid. To this end, Congress required that agencies include impact statements in "every recommendation or report on *proposals* for legislation and other major Federal actions." 42 U.S.C. § 4332(2)(C) (emphasis added). By pushing the EIS requirement back to the early planning stages of a proposal—before legislation has been passed or action has been taken—Congress intended to insure that environmental effects would be considered early enough to be a factor in the decision-making process; and that there would be adequate opportunities to modify a project or program after a proposal had been made.

Petitioners contend that, even if an appropriation is "legislation," there is no "proposal for legislation" until the President submits his budget to Congress (Brief for Petitioners at 29-31). Supposedly, the agency's budget request to Congress is not sufficiently final to constitute a proposal, since the President may always alter or, theoretically, even deny the agency's request *in toto* (*id.* at 30). Petitioners' argument reflects a fundamental confusion between proposals "for"

legislation or major Federal action and proposals "to" certain individuals. NEPA does not by its terms limit applicability of the EIS requirement to proposals going to certain recipients. It applies to *every* recommendation or report on proposals *for* certain activities. 42 U.S.C. § 4332(2)(C).

Section 102(2)(C) requires all federal agencies to prepare an EIS on every proposal whether or not it technically represents a final proposal of the Executive Branch. Any proposal for legislation or other federal action which would significantly affect the environment must be accompanied by an EIS, irrespective of the entity to which it is forwarded or which may make a determination on it. As the court of appeals noted in rejecting petitioners' contention that requests for budget approval and appropriations are not "proposals:"

> Certainly the fact that a proposal is subject to further review by the Executive is no bar to NEPA's requirement for an environmental statement. On the contrary, NEPA calls for an EIS precisely so that environmental consequences may be taken into account before a final decision is reached by the executive official or agency.

(Pet. App. 22a.)

If agency budget proposals are not "proposal[s]" for legislation or other major Federal action under Section 102(2)(C) because they do not constitute the Executive branch's final submission to Congress, then any agency proposal for environmentally-significant legislation would be exempt from NEPA whenever it required a submission to Congress after legislative clearance through OMB. However, there is nothing in

NEPA or its legislative history to indicate that Congress, after specifically providing that all such proposals were to be covered, intended such a broad exemption from the requirements of Section 102(2)(C). Such an argument contravenes the entire thrust of NEPA which is to ensure that *all* federal decisionmakers—including the President and Congress—consider the environmental effects of their decisions before they become final. *City of Boston v. Volpe,* 464 F.2d 254 (1st Cir. 1972). This is best accomplished when they have the benefit of the agency's own assessments and evaluations. *NRDC v. Morton,* 458 F.2d 827, 833 & nn.11,12 (D.C.Cir. 1972), *cited with approval in Vermont Yankee Nuclear Power v. NRDC,* 435 U.S. 519, 534 (1978); *Jones v. District of Columbia Redevelopment Land Agency,* 499 F.2d 502, 510-11 (D.C.Cir. 1974), *cert. denied,* 423 U.S. 937 (1975).

The CEQ Regulations specifically require that, in determining whether a proposal for legislation is a "proposal" under Section 102(2)(C), the controlling factor is not the entity which ultimately forwards the proposal to Congress, but the role of the federal agencies in developing it. § 1508.17, 43 Fed. Reg. 56,004. If a proposal is developed by or with the significant cooperation and support of a federal agency, it is a "proposal for legislation" under Section 102(2)(C), regardless of the entity which transmits it to Congress. *Id.*[31]

[31] The CEQ Regulations and Guidelines on NEPA have consistently recognized that an agency's proposal for legislation or other major Federal action is a "proposal" under Section 102(2)(C) even though a final decision on it is to be made by another agency. *See* § 1501.5, 43 Fed. Reg. 55,992; 40 C.F.R. § 1500.7(b) (1978).

Petitioners' contention that an agency's budget request may never constitute a "proposal for legislation" lacks support under NEPA and is based on a misrepresentation of the way in which the budget process actually works. In reality, agency budget requests are the result of many months of intensive consideration and preparation and they rarely undergo more than superficial alterations by the President before he transmits his combined federal budget to Congress.[32]

At the time the final agency budget request is forwarded to OMB for eventual, formal transmission by the President, it has reached a stage of definiteness which, from the agency standpoint, has established the agency's clear intention to take steps and commit resources which may result in significant environmental effects. *See Environmental Defense Fund v. TVA, supra,* 468 F.2d at 1177. No further action by the agency is required after the submission of its request for budget approval and appropriations. This request is in a form which Congress may use without further reference to the agency. *Realty Income Trust v. Eckerd,* 564 F.2d 447, 453 (D.C.Cir. 1977). Under these circumstances, the budget request is a "proposal" under NEPA.

Petitioners would place agency budget requests into the category of "predecisional document[s]," but the description is neither applicable nor relevant (Brief for Petitioners at 50). In *Kleppe v. Sierra Club,* 427 U.S. 390 (1976), the Court held that an impact statement was not required on a regional coal development plan, because there had been no proposals for action of

[32] *See* discussion, *supra,* at 21-22.

a regional, as opposed to a local or national nature. *Id.* at 399, 400. The Court held that the court of appeals had erred by ignoring the requirement of Section 102(2)(C) that there be a proposal and by devising a "balancing test" to determine the point during the germination process of a "potential proposal" when an impact statement would be required. *Id.* at 406. The Court found that there was no major Federal action, since federal officials were not even contemplating a regional development plan or program. *Id.* at 403.

An agency's budget proposal stands in a different position than the nebulous and uncertain regional program in *Kleppe*. As petitioners' brief indicates, every agency is absolutely certain that there will be an annual congressional appropriation for the agency (Brief for Petitioners at 8-11). An agency knows that it will have to prepare annually a final request for a specific level of appropriations, since agencies are statutorily required to prepare budget requests. *See* 31 U.S.C. § 23. Given the statutory mandate for preparation and submission of a budget, creation of a *legislative* proposal is a certainty. "In such a situation, the court's concern, implicit in *Kleppe*, that an EIS which precedes a proposal would necessarily be unfocused and potentially useless, 427 U.S. at 402, would be unfounded." Note, *supra* note 7, at 590 n.158. While the precise dollar figures may differ from the agency proposal to the President's transmission, the fact is that the agency's policy judgments and program commitments have been finally determined and are reflected in its recommendation for budget approval and appropriations.

The final budget request of an agency is not mere speculation on what might be. It is a solid proposal based on the agency's considered decisions of what

should be. An EIS on the ramifications of actions implementing the agency's proposal, under NEPA and consonant with principles of good management, should accompany the proposal to Congress.

Petitioners imply that there can be no "proposal" until every contingency blocking the path to ultimate realization of the proposal is removed. However, the use of the word "proposal" implies future action. A proposal, while reflecting many decisions already made, is inherently predecisional. The language of Section 102(2)(C) describing the impact statement itself makes it clear that proposals requiring impact statements will be faced with contingencies. Section 102(2)(C) requires the statement to discuss any environmental effects which cannot be avoided "should the proposal be implemented." 42 U.S.C. § 4332(2)(C)(ii). Similarly, the statement must describe any irreversible and irretrievable commitments of resources "which would be involved in the proposed action should it be implemented." *Id.* § 4332(2)(C)(v). An agency could easily discuss anticipated effects of its own proposal, even if the proposal might later be altered by the President. Indeed, the significance of such an alteration would be clarified by the agency's impact statement. If no agency proposal existed until complete implementation of the proposal were assured, then even the President's submission of the combined federal budget would not constitute a "proposal," since the request for approval might be altered by a congressional appropriations committee.

Many courts have refused to adopt petitioners' contention that no proposal exists where there is the pos-

sibility of review.[33] One recent case vividly illustrates the weakness of petitioners' argument. In *Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502 (D.C.Cir. 1974), *cert. denied*, 423 U.S. 937 (1975), plaintiffs challenged the failure of defendants District of Columbia Redevelopment Land Agency (RLA), National Capitol Planning Commission (NCPC), and the U.S. Department of Housing and Urban Development (HUD) to comply with Section 102(2)(C) in formulating and executing urban redevelopment plans. The decision-making process for the redevelopment plans in question required (1) RLA's submission of a proposed program to NCPC for adoption or modification; (2) if NCPC approved the proposal, the submission of the plan to the District of Columbia City Council for a decision whether to empower RLA to submit the proposal to HUD; and finally (3) a HUD decision on whether or not to fund the proposal.

The court of appeals considered whether Section 102(2)(C) required RLA to prepare an EIS to accom-

[33] *See, e.g., Environmental Defense Fund v. Adams*, 434 F. Supp. 403 (D.D.C. 1977). In *Adams*, the court applied *Kleppe* to the required revision by the Secretary of Transportation of the National Airport System Plan, a plan which aids the Secretary in deciding which airport-related projects are approved. *Id.* at 404. The Secretary argued that "so many contingencies stand in the way of the Plan's ever being fully realized that it cannot fairly be said to contain a 'proposal.'" *Id.* at 407. But the court held that the revisions were a "proposal," because the revised Plan would "have all the earmarks of a goal towards which the Secretary is to devote his efforts." *Id.* Similarly, an agency's budget request represents a goal towards which the agency head will devote his/her efforts; witness the ability of the agency head to appeal any revisions in his/her request directly to the President (Brief for Petitioners at 10). Applying the language of *Kleppe* (427 U.S. at 402), the court in *Adams* asserted that a "proposal" would have limits which are clear enough to allow an official meaningfully to address the questions posed in Section 102(2)(C). 434 F. Supp. at 406. The intricacy of agency budget justification statements proves that agency requests are sufficiently well-defined to permit meaningful analysis. *See also Realty Income Trust v. Eckerd*, 564 F.2d 447, 455 (D.C. Cir. 1977) (prospectus on construction of a new federal building is a "proposal" under NEPA even though the specific site and method of financing have not yet been selected); *Environmental Action Foundation v. Brown*, 7 ELR 20,372, 20,373 (D.D.C. 1977) ("[I]n any major Federal program designed to be completed over a period of years, subsequent legislative or executive decisions could result in curtailment or abandonment of the plan").

Petitioners' reliance on *Aberdeen & Rockfish Railroad v. SCRAP*, 422 U.S. 289 (1975) (SCRAP II), is unfounded. The case involved a nonfinal and limited decision by the ICC in a general revenue proceeding regarding a proposed percentage increase in rail rates. The ICC had given consideration to certain environmental factors in the general revenue proceeding and, thereafter, had prepared an EIS, despite the interim nature of the proceeding. The revenue proceeding did not, however, involve any specific challenge to rates on individual commodities or categories thereof; just a general inquiry as to whether a genuine financial crisis existed which would have warranted an increase. The issue under consideration—entitlement of the railroads to some kind of general rate increase—raised few environmental issues and none which had been claimed to have been inadequately considered in the impact statement prepared by the ICC. Although the Court indicated that certain environmental issues had been reviewed in the general revenue proceeding, it noted that the Commission had wide discretion in deciding which issues to address. The underlying rate structure was one issue which the Commission had decided to investigate separately from the general revenue proceeding. Careful attention to the environmental issues which specifically related to the rate structure had been postponed by the ICC for that investigation. Such issues were not appropriate for review. Under these circumstances, the court held that the ICC had taken no federal action regarding the underlying rate structure which was being challenged. Moreover, the court distinguished between notions of "finality" under NEPA and under the Administrative Procedure Act; pointing out that agency consideration of environmental effects may be complete (and subject to review) even though other aspects of federal action are not. *Id.* at 319.

pany its proposal to NCPC. The court concluded that RLA's submission was itself "a proposal for federal action requiring an environmental impact statement." 499 F.2d at 510. The court reasoned as follows:

> The federal defendants argue, however, that to require RLA to submit an environmental impact statement to NCPC together with its action year plan would be inefficient, since NCPC may well modify the plan and thus render RLA's impact statement an anachronism. But, in our view, this argument proves too much. Indeed, it radically misconceives the purposes of the impact statement requirement . . . .
>
> Thus, it is precisely because NCPC has the power to modify RLA's action year proposals that impact statements accompanying the proposals are necessary. NCPC's decision on whether to approve the proposals as presented or to modify them may be, and should be, *vitally affected by the information contained and the conclusions drawn in RLA's impact statements.* Equally important, perhaps, the public will be afforded an opportunity prior to NCPC's decision, to inform it of data and views contrary to those submitted by RLA, thus ensuring that NCPC's own environmental impact statement will be premised on the fullest possible canvassing of environmental issues, and that environmental factors will be taken into account before the action year plans take on the perhaps irreversible momentum of NCPC approval.

499 F.2d at 510-11 (emphasis added).

Under the new CEQ Regulations, a "proposal" exists "at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." § 1508.23, 43

Fed. Reg. 56,005. As respondents have pointed out, by the end of September an agency has made definite and final decisions regarding its funding priorities and allocations for the forthcoming year. When an agency submits its annual budget request to Congress through OMB it already will have considered alternative actions necessary to accomplish its stated goals. Therefore, an agency's annual budget request has reached a stage well beyond that of active preparation for a decision. At very least, it is a "proposal" under the Regulations which can be "meaningfully evaluated." NEPA's action-forcing mandate, therefore, can be properly integrated with agency planning, with beneficial results for every stage of budget management. As important, the President and Congress will have a clear understanding of the environmental consequences which may be triggered by congressional action on the request. Notably, the CEQ Regulations do not require the agency to be guaranteed successful accomplishment of its goals. Such a guarantee would be impossible to require of any proposal.

In sum, by enacting NEPA, Congress has chosen to infuse environmental considerations into the agency decision-making process at a point where choices have been crystallized and alternatives weighed—before irrevocable decisions have been made and resources committed. Under those terms, a budget request is a proposal. The CEQ Regulations,[34] case law and the language of NEPA itself indicate that an agency's budget request is sufficiently final and definite to constitute a "proposal," within the meaning of Section 102(2)(C).

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[34] *See* text accompanying note 31, *supra*.

B. Previous Judicial Decisions Support Application of the Procedural Requirements of NEPA to the Budget Process.

Petitioners claim that the holding of the court of appeals "marks the first significant judicial intervention" in the Executive budget process (Brief for Petitioners at 23).[35] The court of appeals did not "intervene" in the Executive budget process. It simply construed the pronouncements of Congress contained in NEPA as they applied to the budget process.

The issue of the application of NEPA to the budget process is one of first impression for the Court, but there is no lack of judicial precedent to support respondents' contentions. Every court which has treated the issue prior to this Court has held that agency budget requests are proposals for legislation or proposals for other major Federal action.

The most thorough judicial examination of the relationship between NEPA and the budget process was Judge McCree's decision in *Environmental Defense Fund v. TVA,* 468 F.2d 1164 (6th Cir. 1972). *TVA*

[35] Petitioners also claim that, according to their research, only two other decisions have applied NEPA to the budget process (Brief for Petitioners at 23, n.16). In fact, there are more decisions, as respondents point out in the text. Petitioners cite two cases to demonstrate judicial refusal to impose procedural conditions or reporting or disclosure requirements on the budget-making process (*id.*). These cases are not on point. In *Sierra Club v. Department of Interior,* 424 F. Supp. 172, 175 (N.D. Cal. 1976), the court essentially refused to require Congress to appropriate certain funds, while in *National Wildlife Fed'n v. United States,* 8 ELR 20,651, 20,652 (D.D.C. 1978), *app. pending,* No. 78-1976 (D.C. Cir.), the court simply refused to impose certain reporting requirements on the President. While NEPA may impose no procedural requirements on either Congress or the President, it is the legal requirements of federal agencies which are at issue in the instant case.

tested the applicability of NEPA to an ongoing project which was initiated and substantially completed prior to the enactment of NEPA. *Id.* at 1172. The court upheld the application of NEPA to the project on alternative grounds, one of which was that the annual appropriations request by TVA for the project was a "proposal for legislation" requiring preparation of an impact statement. *Id.* at 1181. The court relied on the CEQ Guidelines and the plain meaning of the word "legislation." *Id.* The court was not persuaded by the Government's claim that preparation of impact statements in connection with budget requests would place an enormous administrative burden on federal agencies. *Id.* at 1182. In so holding, the court of appeals was affirming a conclusion independently arrived at by the district court. *Id.* Judge McCree's opinion fully addressed the issue in the instant case, and squarely supported respondents' contentions.

While no court prior to the instant case has examined the question as carefully as Judge McCree, other courts have recognized the applicability of NEPA to the budget process. Referring to the Liquid Metal Fast Breeder Reactor program, the D.C. Circuit noted in 1973 that "[t]he program comes before the Congress as a 'proposal for legislation' each year, in the form of appropriation requests by the (Atomic Energy) Commission." *Scientists' Institute for Public Information, Inc. (SIPI) v. AEC,* 481 F.2d 1079, 1088 (D.C. Cir. 1973). While the D.C. Circuit held the appropriations request to be a "proposal for legislation," another court found that a dam and reservoir project was a "major Federal action," and that NEPA is applicable to all federal action, "including proposals for appropriations." ***Environmental Defense Fund v. Froehlke,***

348 F.Supp. 338, 364 (W.D.Mo. 1972), *aff'd,* 477 F.2d 1033 (8th Cir. 1973). Still another court has held that NEPA was violated when an EIS was not filed at the time of a request for supplementary appropriation by the Corps of Engineers on a dumping operation. *Save Our Sound Fisheries Ass'n v. Callaway,* 387 F.Supp. 292, 309 (D.R.I. 1974). Finally, one other court has rejected the argument that there is no "proposal for legislation" until the President submits his budget to Congress. *Aluli v. Brown,* 437 F.Supp. 602, 607 (D. Haw. 1977), *appeal pending.*[36]

The one-sidedness of judicial interpretations of Section 102(2)(C) as applied to the budget process demonstrates that courts have applied the plain language of Section 102(2)(C) in a manner consistent with congressional intent. Agency consideration and articulation of environmental effects, as well as meaningful participation by the public in decisionmaking, both at the administrative and legislative levels, would otherwise be stymied. Petitioners' interpretation, on the other hand, would require this court to adopt a strained and unsupported holding that would fly in the face of the legislative will. Petitioners would have the Court ignore some words in Section 102(2)(C), add others, and misinterpret the rest. In short, petitioners seek to escape their clear statutory obligations—duties which have been underscored by several courts.

[36] Petitioners try to distinguish these cases on the basis that each involved requests for discrete projects rather than a request involving an entire program (Brief for Petitioners at 23, n.16). This distinction is unrelated to the issue of whether "legislation" includes appropriations. Furthermore, the application of NEPA to discrete projects suggests equal, if not stronger, application to large national programs which, if implemented, may produce extensive environmental consequences.

C. Preparation of Impact Statements in Connection With Certain Budget Requests Would Not Impose Any Significant Additional Burden on the Federal Agencies.

Compliance with the procedural requirements of NEPA has never been held to depend on considerations of administrative difficulty, delay or economic cost. *See Environmental Defense Fund v. TVA,* 468 F.2d 1164, 1176 (6th Cir. 1972). "[P]reparation and circulation of an impact statement is crucial to proper evaluation of environmental factors" and, therefore, strict compliance with Section 102(2)(C) is required. *Id.* In the absence of an existing law applicable to the agency's operations which "expressly prohibits or makes full compliance impossible," each agency *must* comply fully with the purposes and provisions of the Act. 115 Cong. Rec. 39,703 (1969) (House Conferees); *id.* at 40,417-18 (Senate Conferees); CEQ Regulations, § 1500.6, 43 Fed. Reg. 55,992. Strict adherence to NEPA's procedural requirements, however, has never been held to place a "straitjacket" upon the agencies, *SIPI v. AEC,* 481 F.2d 1079, 1092 (D.C. Cir. 1973), nor to impose an impossible standard of compliance, *Environmental Defense Fund v. Corps of Engineers,* 492 F.2d 1123, 1131 (5th Cir. 1974).

Nevertheless, petitioners argue that NEPA should not be applied to the budget process because of time pressures and other uncertainties (Brief for Petitioners at 46-47, 55). Petitioners fail to demonstrate that adherence to the holding of the court of appeals would be impossible, either practically or because of a conflict with any particular statute. Petitioners overstate the administrative burden that full compliance with NEPA would place on the budget process.

The court of appeals adopted a principle limiting the applicability of NEPA to the budget process. The court

held that if there was no proposal to change the status quo, there was no duty to prepare an impact statement (Pet. App. 15a). However, "NEPA may have application to those budget requests that follow or accompany an agency's painstaking review of an ongoing program" (Pet. App. 17a). The court called this painstaking review a "new look," but declined to hold when such a review of an ongoing program is required (Pet. App. 17a-18a).

Agencies have wide discretion in determining whether there will be a considered review of their ongoing programs (Pet. App. 18a).[37] In the instant case, the court found that, after this suit had been filed, the Fish and Wildlife Service had undertaken a programmatic review of the National Wildlife Refuge System for a ten-year period at the 1974 level of funding, and had prepared a programmatic EIS on the review. The court held that this broad EIS had obviated the need for a separate impact statement to cover the specific budget request (*id.*). The implication is that if a programmatic review precedes or accompanies a budget request, an EIS will have to be prepared, because the request would be a "proposal for legislation" and/or a "proposal for major Federal action."

Under the limiting principle of the court of appeals, no impact statement will be required to accompany a budget request unless an agency has previously conducted a fundamental review of an ongoing program. The preparation of an impact statement will depend on

[37] Under the Court's ruling in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), agency discretion would be subject to review only if its decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."

whether an agency decides to undertake a programmatic review (Pet. App. 18a).[38] Moreover, any EIS initially prepared by an agency could be simply supplemented, or merely referenced, in subsequent budget requests which do not involve substantial changes. The court of appeals correctly understood the incremental nature of the budget process. It noted that very few EISs would have to be prepared in the first instance and that, thereafter, routine operation and maintenance of a program would not require another EIS (Pet. App. 22a-23a).

Furthermore, an agency will know as soon as it begins the programmatic review that an impact statement may be due when it requests appropriations legislation many months later. Under NEPA the consideration of environmental factors must take place at the earliest stages of agency planning and to the fullest extent possible. NEPA, the courts,[39] and the CEQ procedures [40]

[38] Petitioners' fear that the court of appeals' decision will involve the judiciary in agency decisionmaking and invite litigation (Brief for Petitioners at 55) is unfounded. Since an agency will know well in advance when an EIS for certain budget requests will be required, it can fairly be assumed that the agency will fulfill its duty under NEPA to prepare an EIS. The agency's action will have "reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption." *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n.15 (1976). In fact, there will be no need for any judicial involvement or litigation unless and until an agency fails to comply with its congressionally mandated duty.

[39] *See, e.g., Hanly v. Kleindienst*, 471 F.2d 823, 837-38 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) ("one of the purposes of the impact statement is to ensure that the relevant environmental data are before the agency and considered by it prior to the decision to commit federal resources to the project.") (Friendly, C. J., dissenting).

[40] The new CEQ Regulations require agencies to commence the NEPA process "at the earliest possible time." § 1501.2(d)(3), 43

all recognize that impact statements are to be used as managerial tools to enhance informed agency decisionmaking, including decisions on the budget. By preparing and considering EISs before irrevocable budget commitments are made to a specific programmatic course of action, limited agency resources can be allocated so as to maximize the benefits of the agency's efforts. After-the-fact justifications of an agency's budget decisions can only lead to the use of its funds in environmentally unsound ways.[41]

Agencies can be provided with guidelines specifically addressing budget requests, such as those which the court of appeals has directed OMB to prepare, and similar to ones which OMB has prepared in the past.[42]

Fed. Reg. 55,992. "Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." § 1501.2, 43 Fed. Reg. 55,992.

[41] The impact statement "shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." § 1502.5, 43 Fed. Reg. 55,995. *See also* Section 102(2)(C)(ii), (v) of NEPA in which Congress describes the content of the impact statement in conditional terms such as "should the proposal be implemented," in order to indicate that the statements are to be analyses of proposals, not excuses for actions. 42 U.S.C. § 4332(2)(C)(ii), (v).

[42] As early as 1971, OMB recognized its responsibilities under NEPA to assist agencies in the preparation of EISs to accompany budget requests. OMB Bulletin No. 72-6 (September 14, 1971) was issued to Federal agencies less than two years after NEPA went into effect. It included the following requirement:

> b. *Annual budget estimates.* Annual budget estimates shall be accompanied by a summary list of those specific actions covered by the estimates which, in accordance with agency procedures, require the preparation of a 102(2)(C) statement. The list shall include . . . the following information by appropriation or fund account:
>
> Column A—*Action, project or activity.* Identify the agency actions and individual projects and activities requiring the preparation of a 102(2)(C) statement.
>
> Column B—*Funds involved.* Identify the amount of funds involved in the budget year, expressed in terms of budget authority and outlays, for those items listed in Column A.
>
> Column C—*Unusual aspects.* Indicate, in each instance, if a draft statement has been completed, whether comments from interested parties have been received, and whether final statements have been completed.
>
> Column D—*Unusual aspects.* Briefly identify unresolved issues, potential controversy, and unusual nature or degree of impact upon the environment.
>
> In the case of programs for which it is not possible to make an assessment of the potential impact on the environment, or to identify 102(2)(C) statements that will be required, agencies may include a narrative statement containing information about general environmental impact and as to when decisions are expected on the need for 102(2)(C) statements.
>
> In addition to submitting the summary list prescribed above, *to facilitate consideration by the Office of Management and Budget of environmental aspects of budget items* [emphasis added], each agency shall, at the earliest time possible, notify the appropriate budget examiner of the Office of Management and Budget of *any action expected to be included in the agency's budget estimate which will have impact upon the environment of particularly significant and/or potentially controversial nature* [emphasis added].
>
> Individual draft or final statements and information to update the listings required above shall be provided by the agencies to members of the staff or the Office of Management and Budget upon their request.

Id. at B-2, B-3.

(Respondents' informal contact with OMB indicates that this Bulletin apparently has been rescinded.)

There is no reason why agencies should find it impossible in practice to comply with the EIS requirement as interpreted by the court of appeals.

Petitioners' contention that the infrequent preparation of impact statements to accompany budget requests will impose an enormous burden is unpersuasive when viewed in the light of the new CEQ Regulations. The Regulations were expressly adopted to relieve significant burden by reducing paper work and delays in EIS preparation. 43 Fed. Reg. 55,978.

Should the Court hold that non-routine requests for budget approval and appropriations are "recommendations or reports on proposals for legislation," agencies would not have to prepare a final impact statement or solicit comments on drafts. § 1506.8, 43 Fed. Reg. 56,001-02. *See also* 40 C.F.R. 1500.12(b) (1978). They would have to prepare a legislative EIS which, in draft form, would be "considered the 'detailed statement' required" by NEPA; and which could be transmitted to Congress up to 30 days after formal transmission of the proposal. § 1506.8(a), 43 Fed. Reg. 56,001. If, on the other hand, requests for appropriations legislation are viewed as recommendations or reports on proposals for major Federal action, the requirement of a final EIS still could be tailored to the legislative process.

Petitioners misconceive the very purpose of Section 102(2)(C). By suggesting that administrative burden may excuse consideration of potential environmental effects, they fail to understand that the procedural requirements in NEPA were meant to improve federal decisionmaking. If that improvement requires greater care in the process of making decisions, such care should not offer an excuse for noncompliance. Respondents find any suggestion of bureaucratic confusion and delay inaccurate, given the intricate and intensive process by which budget decisions are made over a ten-month period. Nevertheless, any burden which conceivably would fall upon agencies would be dissolved by the flexibility of compliance provided in NEPA and the CEQ Regulations. Section 102(2)(C) presents agencies with an opportunity, not a burden.

III. THERE ARE NO CONSTITUTIONAL, STATUTORY OR PRACTICAL REQUIREMENTS OF CONFIDENTIALITY THAT WOULD PREVENT APPLICATION OF NEPA SECTION 102(2)(C) TO THE BUDGET PROCESS.

Section 102(2)(C) provides for more than just a statement to accompany certain recommendations and reports. It requires that these statements be made available to the public in accordance with the Freedom of Information Act, 5 U.S.C. § 552 (1976). Within a few months after NEPA was enacted, the President directed *all* federal agencies to develop procedures for "the fullest practicable provision of timely public information" on the preparation of individual impact statements. Exec. Order No. 11514 § 2(b), 35 Fed. Reg. 4,247. Although NEPA did not direct it, CEQ provided for a three-stage system of impact statement preparation involving preparation of a draft EIS, circulation of the draft for public comment, and preparation of a final impact statement.[43]

Petitioners suggest that, because of the public disclosure provisions of NEPA, application of NEPA to the budget process would raise constitutional, statutory and practical problems (Brief for Petitioners at 32-35, 48-53). Articulation for the public of the existence of environmentally significant proposals is the heart of NEPA. Petitioners' view of the need for total confi-

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[43] *See* 36 Fed. Reg. 7,726 (1971) (1971 Guidelines); 40 C.F.R. § 1500.9 (1978) (current Guidelines); § 1502.9, 43 Fed. Reg. 55,995 (new Regulations).

dentiality in the budget process is disturbing in its implications for the concept of open democratic government. More important, petitioners rest their argument on no solid legal foundation, but on custom and convenience.

In order properly to evaluate the confidentiality claim, careful examination of the court of appeals' holding is required. If the Court deems the agency's budget request to be a "proposal for legislation," then there is no confidentiality problem. Under the new CEQ Regulations, legislative proposals require neither a draft EIS nor any circulation for public comment (except under narrow circumstances not implicating budget requests). The agency EIS is submitted to Congress either with the formal transmission of the proposal by the President or up to 30 days after the proposal is forwarded to Congress, § 1506.8(a), 43 Fed. Reg. 56,001, until which time public disclosure is presumably unnecessary.

Even if a draft statement and public comments were required (as where the request for budget approval and appropriations is treated as a proposal for major Federal action), there would still be little, if any, effect on interagency flow of information. The agency is not required by NEPA to release to the public or to Congress its communications to OMB or to the President with respect to its budget request. Rather, it is required to *prepare* an impact statement based on the budget request and to release *this* statement.

The EIS is a separate, independent document with a statutory significance of its own. It need not detail any of the non-environmental considerations that went into the final agency request. It need not contain or even

paraphrase the interagency communications leading to the budget request; nor must it contain the specific figures which the agency is forwarding to OMB or that OMB is transmitting to the President. It need only describe the significant environmental consequences of the request, focusing on various alternative ranges of funding. Preparation of impact statements will not interfere with the flow of communications among agencies by disclosing raw data and underlying budgetary materials. It would only involve publication of some of the assumptions and factual information inherent in the request.

Petitioners argue that public disclosure of impact statements on budget requests would present a possible violation of the constitutional doctrine of separation of powers and would infringe upon the President's constitutional power to present recommendations for legislation to Congress and to receive the opinions of his cabinet (Brief for Petitioners at 32 & n.22). They base this argument on the assumption that the EIS requirement would be a "procedural restriction on the information the President may receive" (*Id.* at 32). However, it is difficult to understand how preparation of impact statements would restrict the flow of information to the President.[44] If anything, preparation of impact statements with budget requests will *increase* the information available to the President. Also, the publication of an impact statement on an agency budget request will not prevent the President from adopting any

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[44] Petitioners' fears that any relief granted would restrict the flow of information are groundless where, as in the instant case, declaratory relief is sought. Moreover, other forms of relief can be tailored to avoid any constitutional problems. *See generally*, Note, *supra* note 7, at 582-95.

final budget figures he sees fit, nor will it require the revelation of any classified documents or privileged conversations. Compliance with NEPA poses no constitutional hazards.

Petitioners argue that there is a statutory conflict between the public disclosure provisions of NEPA and the Budget and Accounting Act of 1921 (Brief for Petitioners at 51). In order for NEPA to be rendered inapplicable by another statute, there must be a "clear and unavoidable conflict" between NEPA and the other statute—in this instance, the Budget and Accounting Act. *Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 787 (1976).

Specifically with regard to the budget process, OMB itself failed to use the opportunity expressly provided by NEPA to point out any alleged conflict between the Budget and Accounting Act of 1921 and NEPA. Under Section 103 of NEPA, all agencies of the Government were required to review their existing statutory authority, administrative regulations, and current policies and procedures by July 1, 1971, in order to determine whether there were any conflicts between such provisions and NEPA which would prevent full compliance with NEPA. 42 U.S.C. § 4333. Agencies were also directed to present proposals to the President which would bring their authority and policies into conformity with NEPA. *Id.* OMB failed to use this early opportunity, suggesting no such conflict.[45]

[45] As best as we can determine from a review of relevant records on file at CEQ, OMB simply reported that it had no operating programs which affected the environment. Letter from Hon. George P. Shultz to Hon. John D. Dingell (October 15, 1970), *reprinted in Administration of the National Environmental Policy Act: Hearings Before the House Subcomm. on Merchant Marine and Fisheries,* 91st Cong., 2d Sess., app. at 679 (1970). In any event, as discussed *infra* at 65-69, NEPA is wholly consistent with the Budget and Accounting Act, and the Freedom of Information Act exemptions provide no further escape hatch for avoiding preparation of the EIS.

An examination of the provisions of the Budget and Accounting Act upon which petitioners rely reveals no clear and unavoidable conflict with NEPA. Section 201 (a) of the Budget Act provides that the President shall transmit the budget to Congress. 31 U.S.C. § 11(a). Application of NEPA to the budget process does not prevent the President from doing this. Section 206 prohibits agencies from circumventing the President by proposing their budgets directly to Congress. 31 U.S.C. § 15. Preparation and publication of an impact statement by an agency is not a submission of that agency's budget to Congress. Petitioner's heavy reliance on this section is misplaced. Rather than establishing any notion of confidentiality, this provision—in keeping with the underlying legislative purpose of the Budget Act—merely evidences Congress' intention to assure the orderly and simultaneous submission of all agency budget requests to Congress, under uniform accounting procedures. There is nothing on the face of this provision, in its legislative history or in any judicial precedent applying the provision that would give it the meaning claimed by petitioners. Finally, Section 207 requires OMB to organize and transmit to the President the combined federal budget "under such rules and regulations as the President may prescribe." 31 U.S.C. § 16. This provision also does not conflict with NEPA in any way.

Petitioners have referred to a circular issued prior to enactment of NEPA by the Bureau of the Budget which provides that "budget estimates and supporting materials" and "decisions of the President as to his budget recommendations" are to be kept confidential. OMB Circular A-10, ¶ 3, 4 (Rev. Jan. 18, 1964) (A. 225). As previously noted, however, an EIS would not involve disclosure of any of these items.[46] However, even if it did, there would not be any *statutory* conflict which would render NEPA inapplicable to the budget process. Rather, there would be a conflict between the statutory mandate of NEPA and an OMB circular. In such a conflict, the circular must yield to the statute. In short, there is no conflict between NEPA and any statute requiring confidentiality in the budget process.[47]

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[46] Petitioners claim that the cited portions of the OMB circular prevent disclosure of budget materials "in any form" (Brief for Petitioners at 27). In fact, the words "in any form" are never used in the cited paragraphs of the circular (A. 225).

[47] Petitioners also assert that disclosure to the public of impact statements (on budget requests), which is expressly required by Section 102(2)(C) of NEPA, pursuant to the Freedom of Information Act (FOIA), would be impossible since budget requests are "predecisional" documents which are exempt from FOIA (Brief for Petitioners at 50) (*citing Renegotiation Bd. v. Grumman Aircraft Eng'r Corp.*, 421 U.S. 168 (1975)). Petitioners have once again confused disclosure of the agency budget materials which are forwarded to the President with disclosure of a separately prepared impact statement discussing environmental consequences of budget decisions. Although we contend that budget requests represent final agency proposals, whether they do or not is immaterial for purposes of FOIA, since it is not the requests, but the accompanying impact statements, which will be disclosed. We do not seek the release of any interagency or intraagency documents encompassed by FOIA.

The NEPA statements are not internal memoranda setting forth confidential advice or recommendations. They are documents prepared for the specific purpose of describing for decisionmakers and the public the factual bases for the proposals being considered and the likely environmental impacts of such proposals.

If the claimed exemption protects government officials from preparing environmental statements on proposals for appropriations legislation, the unfortunate and unintended result would be to protect those same officials from preparing EISs on proposals for substantive legislation, or on proposals for major Federal actions. Such actions involve communications and written documents which are protected from disclosure under the fifth exemption in FOIA.

Petitioners also assert that requiring the disclosure to the public of EISs on budget requests would collide with the need for confidentiality (Brief for Petitioners at 51-52). This argument is unpersuasive. Section 102(2)(C) of NEPA expressly requires the disclosure of EISs *in accordance with* the Freedom of Information Act (FOIA). Thus, *if* such EISs were properly regarded as "predecisional" documents exempt from disclosure (as we submit they are not), there would be no conflict with NEPA, since it would not require public disclosure. Moreover, assuming that budget request EISs are exempt from public disclosure under FOIA, petitioners' suggestion that the agency is not required to submit an EIS with its proposal for consideration *within* the government is unsupported. This would violate NEPA's express mandate that agencies comply "to the fullest extent possible." Furthermore, CEQ has specifically adopted a procedure whereby classified information in an EIS can be restricted from public dissemination, while the unclassified portions are disclosed. § 1507.3(c), 43 Fed. Reg. 56,003.

Petitioners are left with policy arguments which essentially defend the political convenience of secretive budget processes. Petitioners argue that disclosure of

impact statements would lead to "political fragmentation of the President's cabinet and Administration," would "injure the President's interest in speaking for his Administration," and would "undermine the confidentiality and reshape the character of the presidential budget process" (Brief for Petitioners at 51-53). Petitioners state these conclusions without explaining how they occur.

The question of disclosure versus confidentiality is not one of absolutes, but one of timing. The decisions underlying some budget information which is publicly detailed in January would be initially revealed in September. (As respondents have pointed out, impact statements would not be required on most portions of the budget.) It seems inconceivable that a three-to-four-month difference in timing could set cabinet member against cabinet member, shatter the unity of the Administration, and destroy the budget process. Moreover, as we stress above, the only disclosure involved in this case is that of an independent document discussing the environmental consequences of, and reasonable alternatives to, ranges of funding for relevant parts of an agency's programs.

However, if complete confidentiality is deemed essential, it can be maintained while concurrently preserving the applicability of NEPA to the budget process. NEPA does not require the preparation of draft EISs or their circulation for public comment. Publication of the agency impact statement can be delayed until the President, having benefited from the information in it, submits his combined federal budget to Congress. The essential purpose of NEPA will have been served by the requirement that agencies consider environmental factors in their decisionmaking, without impairing confidentiality. Moreover, the public will still have the opportunity to comment on the environmental consequences of the budget before congressional committees. Furthermore, an agency need not even identify its preferred alternative in an EIS if "another law prohibits the expression of such a preference." CEQ Regulations § 1502.14(e), 43 Fed. Reg. 55,996. Thus, there are no constitutional, statutory or practical conflicts between NEPA and the agency budget process. Any fears of such conflicts would be alleviated by skillfully limiting the method and timing of disclosure. The purposes of NEPA would be served and the integrity of the budget process maintained.

IV. SECTION 102(2)(B) OF NEPA REQUIRES OMB TO PREPARE METHODS AND PROCEDURES TO GUIDE AGENCIES IN THEIR PREPARATION OF EISs FOR BUDGET REQUESTS.

A. The consistent failure of agencies to comply with NEPA with respect to their budget requests has resulted in confusion over just how NEPA does apply. Petitioners argue that the limiting principle adopted by the court of appeals is "uncertain" (Brief for Petitioners at 54). But the real uncertainty is that resulting from "presently unquantified environmental amenities" which do not receive "appropriate consideration in decisionmaking." 42 U.S.C. § 4332(2)(B).

Under Section 102(2)(B) of NEPA all agencies of the Federal Government must identify and develop methods and procedures in consultation with CEQ to insure that such uncertainty is avoided. As the agency with direct control over the budget process, OMB has a practical and statutory duty to prepare guidelines

for all agencies to aid them in fulfilling their budgetary responsibilities in compliance with NEPA.

It is clear that OMB is an "agency" within the meaning of NEPA. No exclusion for OMB is provided in the Act. NEPA applies to all federal agencies except those engaged in "the performance of staff functions for the President in his Executive Office." § 1508.12, 43 Fed. Reg. 56,004. OMB claims that "*certain* functional units of [OMB] solely advise and assist the President." 5 C.F.R. § 1303.20(b) (1978) (emphasis added). This necessarily implies that *other* units of OMB *do* perform functions as independent entities, thus placing OMB squarely within the scope of NEPA.

Legal precedent supports respondents' position. Even when the President is required personally to approve federal agencies' proposals before they become effective, courts have held that NEPA applies to the agencies. *See, e.g., Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 788, 791 (D.C. Cir. 1973) ("approval by the President and compliance with NEPA are two separate statutory requirements"); *Natural Resources Defense Council v. Morton*, 458 F.2d 827, § 35 (D.C. Cir. 1972) (court assumed that the Domestic Council in the President's Executive Office was an agency subject to the requirements of NEPA). In other contexts as well, case law supports our contention that OMB is a creature of Congress which does not operate merely as staff to the President, but also as an independent entity. *See Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (Office of Science and Technology considered an agency for FOIA purposes despite its contention that it served only to advise the President).

Petitioners suggest that CEQ and not OMB should draft the guidelines which respondents seek (Brief for Petitioners at 57-58). Such an interpretation of Section 102(2)(B) would render its language redundant. During consideration of NEPA, Congress clearly assumed that OMB would play a major role in providing guidance to agencies on their compliance with the Act. As the "father" and leading sponsor of NEPA, Senator Jackson also understood OMB's role to be important.[48] He, too, envisioned that OMB would be "requiring that the environmental policies and standards be adhered to in connection with the responsibilities of the Federal establishment." *National Environmental Policy: Hearings Before the Senate Committee on Interior and Insular Affairs*, 91st Cong. 1st Sess. 117 (1969). *See* R. Liroff, A National Policy for the Environment 16-17 (1976).

CEQ itself has consistently recognized that OMB would play a major role in administering NEPA. Every set of Guidelines promulgated on NEPA by CEQ has made specific reference to this role.[49]

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[48] The Court has repeatedly emphasized that in determining legislative intent "[i]t is the sponsors that we look to when the meaning of the statutory word is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951). *See FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) ("substantial weight in interpreting the statute" given to a statement of one of the legislation's sponsors).

[49] *See* [1970] CEQ Ann. Rep. 287; 36 Fed. Reg. 7,724 (1971); 40 C.F.R. § 1500.3(b) (1978). For example, in the 1970 Guidelines, CEQ noted that the Bureau of the Budget would "supplement these general guidelines with specific instructions relating to the way in which the Section 102(2)(C) procedure fits into its legislative clearance process." [1970] CEQ Ann. Rep. 289. The same provision appeared in the Revised Guidelines less than a year later.

That OMB originally must have understood its own responsibilities in shaping the EIS process for agency budget requests is confirmed by its issuance of OMB Bulletin No. 72-6 nearly eight years ago.[50] The Bulletin provided specific guidelines to agencies on their Section 102(2)(C) duties. In short, Congress not only intended for OMB to prepare the guidelines sought by respondents, but OMB has demonstrated that it is fully capable of preparing them.

B. Petitioners assert that respondents do not have standing to assert claims against OMB under Section 102(2)(B) of NEPA (Brief for Petitioners at 60). Respondents requested a declaration that OMB had violated this Section by failing to develop formal methods and procedures which would aid agencies in complying with the procedural requirements of NEPA as applied to the budget process (A. 20). Petitioners argue that respondents "cannot show, as they must, that OMB's failure to adopt such guidelines has 'caused' another agency's failure to prepare an EIS in connection with its annual budget request" (Brief for Petitioners at 60). Petitioners claim that any duty agencies may have to prepare impact statements in connection with budget requests already exists and would be unaffected by the adoption by OMB of guide-

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Thus, a definite role for OMB in implementing the EIS requirements of NEPA as they related to requests for appropriations legislation was clearly contemplated by NEPA, as interpreted shortly after the Act's passage, by CEQ itself. When the existing 1973 Guidelines were promulgated, they too envisioned specific functions for OMB in assessing the environmental impacts of proposed agency action, including "requests for appropriation" legislation. 40 C.F.R. §§ 1500.3(b), (c), 1500.12 (1978).

[50] *See* note 42, *supra*.

lines (*Id.* at 61). Furthermore, they contend, OMB is entitled to a "presumption of regularity," meaning that OMB may assume that agencies will adhere to the NEPA requirement regardless of whether OMB guidelines are issued (*Id.*).

The Court has stated that plaintiffs have standing only if the injury which plaintiffs have allegedly suffered can be traced fairly to the challenged action (or, by implication, inaction in the face of a duty to act) by the defendant, and not if the injury to plaintiffs results from the independent action of some party not before the court. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41-42 (1976). In *Simon* the Court denied plaintiffs standing, because it was merely speculative whether a change in defendants' action in granting tax relief to certain non-parties would have resulted in any change in the conduct of those non-parties towards plaintiffs. *Id.* at 42-43.

Respondents have argued that the non-existence of OMB guidelines has led to the failure of agencies such as DOI to prepare impact statements, a failure which petitioners admit may cause injury to respondents (Brief for Petitioners at 59-60). In the instant case the parties before the Court are officials of OMB and DOI. Therefore, in contrast to the factual situation in *Simon,* all of the parties in the chain of causation are before the Court.

Respondents are also injured by the failure of OMB to consider the environmental information contained in the EIS prior to the transmission of the agency's proposal to the President. *See generally,* Note, *supra*

note 7, at 576-78.[51] Moreover, the efficacy of OMB guidelines need not rest on pure speculation, but may be demonstrated by past experience. In the absence of guidelines on impact statements for budget requests, no such statements have ever been voluntarily prepared by an agency. *See* 43 Fed. Reg. 55,989. Petitioners' "presumption of regularity" fails to stand up in the light of experience, and the presumption of regularity is thus defeated by "clear evidence to the contrary." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 15-16 (1926). Furthermore, respondents are entitled to rely on the same presumption of regularity which petitioners claim. If guidelines existed, respondents may assume that agencies would follow them and prepare impact statements when appropriate. Since the petitioners concede that failure to prepare EISs may cause injury to respondents, respondents clearly have standing to demand that OMB carry out its legal duty

[51] The nature and purposes of NEPA require the recognition of a more attenuated line of causation of injury than would otherwise be allowed. *United States v. SCRAP*, 412 U.S. 669 (1973) (SCRAP I); *Sierra Club v. Mason*, 351 F. Supp. 419 (D. Conn. 1972). *See generally*, Note, *supra* note 7, at 574-75, 578-82.

The district court had the power to allow or require respondents to supply affidavits supporting the allegations of fact upon which respondents' standing was based. *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). The district court failed to do so and did not address the issue of standing. Summary judgment denying standing will normally be granted only if the allegations of injury are shams and the affidavits raise no genuine issues of fact. *Paton v. La Prade*, 524 F.2d 862, 867 (3d Cir. 1975). In any event, if the Court has doubts about respondents' standing to sue on this issue, it should affirm the court of appeals' remand to the district court and allow petitioners specifically to controvert by affidavit any of respondents' allegations concerning standing (Pet. App. 9a).

under NEPA to prepare guidelines that would lead to the preparation of impact statements.[52]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[52] Petitioners cannot have their argument both ways. If OMB's duty to issue procedures for the preparation of EISs on certain budget requests would constitute an "indirect imposition of this requirement" on the Department of the Interior (Brief for Petitioners at 23, n.15), petitioners seem to be acknowledging that respondents have suffered injury by OMB's failure to prepare such procedures; and, therefore, that respondents have standing to assert claims against OMB under Section 102(2)(B) of NEPA.

* Jerome C. Tinianow, a second-year law student at George Washington University, contributed substantially to the preparation of this brief. Mr. Tinianow is serving as a clerk with the Sierra Club Legal Defense Fund under the George Washington University Legal Aid Program.